Submitted 1-30-84 Judge Davis
under rule
Davis 4.
Aff'd — Affirmed —
Harlan
Davis

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 608.

WILLIAM H. HOOVER, ASSIGNEE OF ELIAS S. OPPENHEIMER, A BANKRUPT, PLAINTIFF IN ERROR,

vs.

ABRAHAM WISE, HERMAN GREENBAUM, MOSES GREENBAUM, AND JACOB GREENBAUM.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED SEPTEMBER 25, 1875.

SUPREME COURT OF THE UNITED STATES.

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a In court of appeals.

WILLIAM H. HOOVER, ASSIGNEE, &c., APPELLANT,
against
HERMAN GREENBAUM, IMPLEADED, &c., RESPONDENT.

Return on appeal.

Brown & Estes, plaintiffs' and appellants' attorneys; Roger A. Pryor, attorney for defendant and respondent, Henry Greenbaum.

1 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the supreme court of the State of New York, in the first judicial department of said State, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court of the State of New York, before you, or some of you, having thereto been remitted by the court of appeals of said State, after the decision rendered by the said court of appeals, being the highest court of law or equity of the said State in which a decision could be had in the said suit between William H. Hoover, as assignee, in bankruptcy of Elias S. Oppenheimer, a bankrupt, and Abraham Wise, Herman Greenbaum, Moses Greenbaum, and Jacob Greenbaum, wherein a right, title, and privilege was claimed, under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2nd, 1867, and the decision was against the right, title, and privilege specially set up or claimed under such statute, a manifest error hath happened, to the great damage of the said William H.

2 Hoover, as assignee as aforesaid, as by his complaint appears:

We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, the 24th day of November, in the year of our Lord one thousand eight hundred and seventy-four.

KENNETH G. WHITE,
Clerk of the Circuit Court of the U. S.
for the South. Dist. of New York.

(Indorsed:) Supreme Court of the United States. William H. Hoover as assignee, &c., plaintiff in error, against Abraham Wise, Herman Greenbaum, Moses Greenbaum, and Jacob Greenbaum, defendants in error. Writ of error. E. F. Brown, attorney for plff. in error. Filed Nov. 24, 1874.

3 The court of appeals of the State of New York.

WILLIAM H. HOOVER, AS ASSIGNEE IN BANKRUPTCY of Elias S. Oppenheimer, a bankrupt,
against
ABRAHAM WISE, HERMAN GREENBAUM, MOSES Greenbaum, and Jacob Greenbaum.

To the honorable the judges of the court of appeals of the State of New York:

The petition of William H. Hoover, as assignee in bankruptcy of Elias S. Oppenheimer, respectfully represents, that in the above cause he claimed a right, title, and privilege under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2nd, 1867; that the decision in said cause is against the right, title, and privilege so claimed as aforesaid by your petitioner; that the judgment rendered therein is final, and not merely interlocutory; that said judgment is rendered in the highest court of the State in which a decision in the said cause can be had; that all the aforesaid matters appear of record in this
4 cause; that your petitioner is advised that there is error in said judgment:

Wherefore your petitioner prays that a writ of error may be allowed in this cause so that the said judgment may be re-examined in the Supreme Court of the United States.

EDGAR F. BROWN,
Attorney for Petitioner, 229 Broadway, New York City, Room 36.

It is hereby ordered, this 19th day of November, A. D. 1874, that a writ of error be and the same is hereby allowed in the above case, so that the judgment rendered therein may be re-examined by the Supreme Court of the United States.

S. E. CHURCH,
Ch. J. Court of Appeals, N. Y.

The above-mentioned writ of error is allowed by me, November 23d, 1874.

JOHN A. LOTT,
Chief Com'r of Appeals.

(Indorsed:) Court of appeals. William H. Hoover, as assignee, etc., petitioner, ag'st Abraham Wise, Herman Greenbaum, and others. Petition. Edgar F. Brown, atty. for petitioner, 229 Broadway, N. Y. City, room 36. Filed Nov. 24, 1874.

5 UNITED STATES OF AMERICA:

To Abraham Wise, Herman Greenbaum, Moses Greenbaum, and Jacob Greenbaum, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the city and county of New York, wherein William H. Hoover, as assignee in bankruptcy, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Sanford E. Church, chief-judge of the court

of appeals of the State of New York, this 19th day of November, in the year of our Lord one thousand eight hundred and seventy-four.

S. E. CHURCH,
Ch. J. Court of Appeals.
JOHN A. LOTT.
Chief Com'r of Appeals.

6 Supreme Court, United States.

WILLIAM H. HOOVER, AS ASSIGNEE, &c., plaintiff in error,
agst.
ABRAHAM WISE, HERMAN GREENBAUM, Moses Greenbaum, and Jacob Greenbaum, defts. in error.

CITY AND COUNTY OF NEW YORK, *ss:*

Edward E. Wells, being duly sworn, says that he is clerk in the office of plaintiff's atty. herein, and that on the 25th day of November, 1874, he served the within citation on Roger A. Pryor, esq., the attorney for the defendants herein, by delivering a copy of the same to him personally, at his office, at number 22 Pine street in the city of New York, and leaving the same with him, and at the same time and place exhibiting to him the within original.

EDWARD E. WELLS.

Sworn to before me this 16th day of July, 1875.

C. H. DUELL,
Notary Public, N. Y. Co.

(Indorsed:) William H. Hoover, as assignee, etc., plff. in error, agst. Abraham Wise, Herman Greenbaum, and others, defdts. in error. Citation. Edgar F. Brown, atty. for plff. in error, 229 Broadway, N. Y. City, room 36. Bond filed Nov. 24, 1874.

7 STATE OF NEW YORK,
City and County of New York, ss:

I, William Walsh, clerk of the said city and county, and clerk of the supreme court of said State for said county, do certify that I have compared the preceding and annexed with the original record and proceedings in the case of William H. Hoover, as assignee in bankruptcy, &c., against Herman Greenbaum et al., on file in my office, and that the same are correct transcripts therefrom, and of the whole of such originals.

In witness whereof I have hereunto subscribed my name and affixed my official seal this seventeenth day of July, 1875.

[SEAL.] WM. WALSH, *Clerk.*

8 New York supreme court.

WILLIAM H. HOOVER, AS ASSIGNEE IN BANKRUPTCY of Elias S. Oppenheimer, a bankrupt,
agst.
HERMAN GREENBAUM, IMPL'D, &C.

The plaintiff in this action having appealed to the court of appeals from an order of the general term of this court granting a new trial, and said court of appeals having affirmed the order of the general term, and ordered judgment absolute to be entered in favor of the above-named defendant and against the above-named plaintiff, with costs, and the costs of said defendant having been duly adjudged at $495.56,

now, on motion of Roger A. Pryor, defendant's attorney, it is adjudged that the defendant, Herman Greenbaum, do recover of the plaintiff the sum of $495.54 *dollars*, his costs & disbursements in this action, and that said defendant have execution accordingly.

Dated October 20, 1874.

9 N. Y. supreme court.

WILLIAM H. HOOVER *against* HERMAN GREENBAUM. } Costs.

COSTS.

Costs before notice of trial	10
" after " "	15
Additional defendants served	
Trial fee, issue of fact	30
" issue of law	
Allowance by statute	
" " court	
Motion	
Trial occupied more than two days	10
Appointment of guardian of infant defendant	
Examination of party before trial	
Attending and taking deposition de bene esse	
Drawing interrogatories to annex to commissions	20
Making and serving case. G. T.	20
" " amendments to case	
" " case of more than 50 folios	10
Term fees, circuit $20 off.	50
Gen'l term	30
Court of appeals, $10 off.	60
Motion for new trial, special term	
Proceedings before and after granting new trial	
Applic'n for judg't on spec'l verdict before argum't	
Applic'n for judg't on spec'l verdict for argument	
Appeal to general term before argument	20
" " for argument	40
" court of appeals before argument	30
" " " for argument	60
Preparing case on appeal to court of appeals	
Damages in court of appeals for delay	
Interest on verdict	
	405 00
Disbursements	112 54
Total	517 54
	22
	495 54

DISBURSEMENTS.

Referee's fees	
Commissioner's fees	
Clerk's fees, trial fee, rents, J. G. T. $1 off.	3
Paid for searches	
Affidavits and acknowledgments	1 50
Serving copy summons and complaint	
Paid referee's report	
Certified copies orders	10
Satisfaction-piece	25
Transcript and filing	
Certified copy judgment off.	1 00
Postage	
Jury-fees	
Stenographer's fees	
Sheriff's fees on execution	69
" " attachment	
" term fees	
Extract from minutes	
Paid printing cases, gen'l term	88 50
" " points, ct. appeals	12
" copies following papers	
Remittitur	5 50
Attendance of following witnesses:	
	112 54

Adjusted on notice at $495.54.
Oct. 19th, 1874.

WM. WALSH, *Clerk.*

CITY AND COUNTY OF NEW YORK, *ss*:

Roger A. Pryor, the attorney for the respondent in the above-entitled action, being duly sworn, says that the foregoing disbursements have been made in this action, or will be necessarily incurred therein, to the best of his knowledge and belief.

ROGER A. PRYOR.

Sworn to before me, 17 Oct'r, 1874.

'ASA A. SPEAR,
Notary Public, Kings Co.

10 Take notice that we shall present a bill of costs, of which the foregoing is a true copy, to the clerk of this court, for adjustment, at his office in the court-house in the city of New York, on the 19th day of October, 1874, at 10½ o'clock in the forenoon of that day.

Yours, &c.,

ROGER A. PRYOR,
Attorney for Respondent.

17th October, 1874.

To Messrs. BROWN & ESTES,
Attorneys for Appellants.

(Indorsed:) N. Y. supreme court. William H. Hoover against Herman Greenbaum. Bill of costs and notice. Roger A. Pryor, attorney for respondent, 22 Pine st., N. Y. City, to , esq., attorney . Due service of a copy of the within bill of costs and notice is hereby admitted. N. Y., Oct'r 17th, 1874. Brown & Estes, plffs.' attys.

11 At a special term of the supreme court of the State of New York, held at the court-house in the city of New York, on the 17th day of October, 1874—prest., Hon. .

WILLIAM H. HOOVER, AS ASSIGNEE IN BANKRUPTCY of Elias S. Oppenheimer, a bankrupt,
agst.
HERMAN GREENBAUM, IMPL'D, &c.

William H. Hoover, as assignee in bankruptcy of Elias S. Oppenheimer, a bankrupt, having appealed to the court of appeals from the order of the general term of this court directing a new trial, which order was signed by the clerk of this court and duly entered in his office on the 30th day of April, 1874, and the court of appeals having af-
12 firmed the said order, and, pursuant to stipulation, rendered judgment absolute for Herman Greenbaum, defendant:

Now, on reading and filing the remittitur from the said court of appeals, and on motion of Roger A. Pryor, attorney for respondent, it is ordered that the judgment of the court of appeals be, and the same is hereby, made the judgment of this court, and that the respondent, Herman Greenbaum, have execution thereon.

A copy.

WM. WALSH, *Clerk.*

13 Court of appeals, State of New York, ss:

Remittitur, Oct. 14, 1874.

Pleas in the court of appeals held at the capitol in the city of Albany, on the 2d day of October, in the year of our Lord one thousand eight hundred and seventy-four, before the judges of said court. Witness the Hon. Sanford E. Church, chief judge, presiding. E. O. Perrin, clerk.

WILLIAM H. HOOVER, ASSIGNEE, &C., APPELLANT,
agst.
HERMAN GREENBAUM, RESPONDENT.

Be it remembered that, on the 31st day of May, in the year of
14 our Lord one thousand eight hundred and seventy-two, William H. Hoover, assignee, &c., the appellant in this action, came here into the court of appeals, by Brown & Estes, his attorneys, and filed in the said court a notice of appeal and return thereto from the order of the general term of the supreme court of the first judicial department, and Herman Greenbaum, the respondent in said action, afterwards appeared in said court of appeals, by Kaufman, Frank & Wilcoxson, his attorneys, which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed; whereupon the said court of appeals having heard this cause argued by Mr. Benjamin Estes, of counsel for the appellant, and by Mr. Roger A. Pryor, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the general term of the supreme court, appealed from
15 in this action, be, and hereby is, in all things affirmed.

And it was further ordered that judgment absolute be ordered against the plaintiff, with costs; and it was also further ordered that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore it is considered that the said order be affirmed and judgment absolute ordered against the plaintiff, with costs as aforesaid.

And hereupon, as well *as* the notice of appeal and return thereto aforesaid, as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justice thereof, according to the form of the statute in such case made and pro-
16 vided, to be enforced according to law, and which record now remains in the said supreme court, before the justices thereof, &c.

E. O. PERRIN,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, Oct. 14, 1874.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] E. O. PERRIN, *Clerk.*

(Endorsed:) Filed October 20, 1874, at 2 h. & 40 m.

17 *Summons for a money demand on contract.*

Supreme court, city and county of New York, State of New York.

WILLIAM H. HOOVER, AS ASSIGNEE IN BANKruptcy of Elias S. Oppenheimer, a bankrupt, plaintiff,
against
ABRAHAM WISE, HERMAN GREENBAUM, MOSES Greenbaum, and Jacob Greenbaum, defendants.

To the defendants and each of them:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscribers at their office, No. 229 Broadway, New York City, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the complaint within the time aforesaid, the plaintiff in this action will take judgment against you for the sum of three hundred and seventy-nine dollars fourteen cents, with interest from the first day of December, one thousand eight hundred and sixty-eight, besides the costs of this action.

Dated New York, October 1st, 1869.

BROWN & ESTES,
Plaintiff's Attorneys, 229 Broadway, New York City.

18 Supreme court.

WILLIAM H. HOOVER, AS ASSIGNEE IN BANKruptcy of Elias S. Oppenheimer, a bankrupt,
against
ABRAHAM WISE, HERMAN GREENBAUM, MOSES Greenbaum, and Jacob Greenbaum.

The plaintiff above named, by Brown & Estes, his attorneys, complains of the defendants herein, and alleges—

That he, William H. Hoover, is a resident of the State of Nebraska, and is the assignee in bankruptcy of Elias S. Oppenheimer, a bankrupt, duly adjudged and declared such by the district court of the United States for the district of Nebraska. That these defendants were, at the times hereinafter mentioned, copartners, doing business in the city of New York under the firm, name, and style of Wise, Greenbaum & Co.

That on the 10th day of August, 1868, said Elias S. Oppenheimer, of the State of Nebraska, being insolvent or in contemplation of insolvency, and with intent to give the defendants a preference over others of his creditors, confessed a judgment in favor of defendants' firm for the sum of eleven hundred and twenty-four dollars seventy-five cents, in a court of competent jurisdiction in the State of Nebraska.

That subsequently, and on or about the 11th day of November, 1868, said Elias S. Oppenheimer filed his petition and schedule, and
19 went into bankruptcy, and was adjudged and declared a bankrupt, according to the provisions of the bankrupt law, thus making defendants' firm a preferred creditor.

That four months did not elapse between the confession of said judgment and the commencement of proceedings in bankruptcy.

That the defendants, at the time of such confession of judgment, knew, or had reasonable cause to believe, said Oppenheimer insolvent, and that said judgment was confessed and preference given in fraud of the provisions of act entitled "An act to establish a uniform system of bankruptcy throughout the United States," passed March 2, 1867, and the amendments thereto. That defendants' firm, or their agent, collected and received, on account of said judgment, and prior to the commencement of proceedings in bankruptcy or shortly thereafter, from the said Oppenheimer, three hundred and seventy-nine dollars and fourteen cents.

That this plaintiff, as such assignee, is entitled to recover of these defendants, the whole amount received by them on account of said judgment, under the 35th section of the bankrupt act.

That this plaintiff, as such assignee, has several times demanded said sum of these defendants, but said defendants have refused and still refuse to pay the same, or any part thereof.

Wherefore this plaintiff demands judgment against these defendants for the sum of three hundred and seventy nine dollars and fourteen cents, with interest thereon from the first day of December, 1868, besides the costs of this action.

BROWN & ESTES,
Plaintiffs' Attorneys.

20 CITY AND COUNTY OF NEW YORK, *ss:*

Frederick E. Barnard, being duly sworn, says that he is the agent of the plaintiff in this action, for the purpose of collecting the demand sued in the complaint; that the foregoing complaint is true to his knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason why the verification is not made by the plaintiff is that he is not within the city, county, and State of New York, where this deponent resides, and that this deponent's knowledge, information, and belief *is* derived from letters and memoranda received by him, and which are now in his possession, and from statements and admissions made to him by the defendants.

F. E. BARNARD.

Sworn to before me this 12th day of October, 1869.

P. J. GAGE,
Notary Public, New York City and County.

21 Supreme court of the city and county of New York.

WILLIAM H. HOOVER, AS ASSIGNEE IN BANKRUPCY of Elias S. Oppenheimer, a bankrupt, plaintiff,
against
ABRAHAM WISE, HERMAN GREENBAUM, MOSES Greenbaum, and Jacob Greenbaum, defendants.

The defendant, Herman Greenbaum, answering for himself, says:

First. That he has no information sufficient to form a belief that Elias S. Oppenheimer filed a petition in bankruptcy, or that he was adjudged a bankrupt, or that the plaintiff was appointed or is assignee in bankruptcy of Elias S. Oppenheimer, or that any proceedings were

had in bankruptcy against said Elias S. Oppenheimer, or upon his petition, and therefore denies each and every allegation in that behalf in the complaint contained.

Second. And the defendant denies each and every other allegation in the complaint contained not hereinafter specifically admitted.

Third. And the defendant alleges that the defendants dissolved their copartnership on February 1st, 1868; that this defendant, by the agreement of dissolution, is liquidating the affairs of the defendants' late firm; that for the purpose of such liquidation he handed a claim of defendants against Elias S. Oppenheimer to Messrs. Ledyard, Archer & Co., then of New York City, for collection.

KAUFMANN, FRANK & WILCOXSON,
Attorneys for Defendant Herman Greenbaum.

22 CITY AND COUNTY OF NEW YORK, *ss:*

Herman Greenbaum, one of the defendants herein, being duly sworn, says that the foregoing answer is true to his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

HERMAN GREENBAUM.

Sworn to before me this 28th day of October, 1869.

ALFRED ERBE,
Notary Public.

At a special term of the supreme court, held at the court-house in the city of New York, on the 30th day of December, 1870—present, Hon. Daniel P. Ingraham, justice.

WILLIAM H. HOOVER, AS ASSIGNEE IN BANKRUPTCY of Elias S. Oppenheimer, a bankrupt, plaintiff,
against
ABRAHAM WISE, HERMAN GREENBAUM, MOSES Greenbaum, and Jacob Greenbaum, defendants.

On the annexed consent and the motion of Brown and Estes, attorneys for the plaintiff in this action—

Ordered that the cause and all the issues thereof be, and the
23 same is hereby, referred to Hooper C. Van Vorst, counsellor at law, to hear and determine the same and report to the court.

(A copy.)

CHAS. E. LOEW, *Clerk.*

The plaintiffs' counsel opened the case, and put in evidence exemplified copy record of judgment by confession, marked "Exhibit A;" also, depositions of McLennan and Archibold; also, a certified copy of the assignment in bankruptcy to plaintiff by Elias S. Oppenheimer, and order of adjudication of bankruptcy of said Oppenheimer. (Exhibit A.)

Be it remembered that at a term of the district court of the first judicial district of the State of Nebraska, in and for Otoe County, of said State, present, the honorable Oliver P. Mason, sole presiding judge of said court, presiding at said court, began and held at Nebraska City,

Otoe County, Nebraska, on the 15th day of June, A. D. 1868, the following proceedings were had and done:

ABRAHAM WISE, HERMAN GREENBAUM, JACOB Greenbaum, and Moses Greenbaum, partners, trading under the name, style, and firm of Wise, Greenbaum & Co., plaintiffs,
vs.
ELIAS S. OPPENHEIMER, DEFENDANT.

And now, on the 1st day of August, A. D. 1868, come the above-named plaintiffs, and file their petition with the clerk of this court, in the words and figures following, to wit:

24 *Petition in a civil action to the honorable district court of said county.*

STATE OF NEBRASKA,
Otoe County, ss:

The plaintiffs allege and say that, on the 8th day of October, 1867, they, the said plaintiffs, sold and delivered to said defendant, at his request divers goods, wares, and merchandise, a schedule of which is hereto annexed as part and parcel of this petition, for the price and value of one thousand and forty-three dollars, then agreed to be paid therefore by the said defendants in four months after that date; and they further allege and say that no part of said sum of money has been paid, and that said defendant, Elias S. Oppenheimer, is now indebted to said plaintiffs in the sum of one thousand and forty-three dollars, with interest thereon from the eight' day of February now last past; for which the yask judgment and costs of suit.

McLENNAN & ARCHIBOLD,
Attorneys for Plaintiffs.

STATE OF NEBRASKA,
Otoe County, ss:

William McLennan, being sworn, says that he is attorney for plaintiffs, who reside out of this State, and are now absent from this county, and cannot make this affidavit by reason of absence; and that the said William McLennan verily believes all the allegations of the foregoing petition to be true in substance and matters of facts.

WM. McLENNAN.

Sworn to before me and subscribed in my presence this 1st day of August, 1868.

GUY A. BROWN, *Clerk.*

25 *Schedule referred to in above petition.*

[A. Wise, H. Greenbaum, J. Greenbaum, M. Greenbaum, manufacturers of shirts, drawers, overalls, etc. Terms, 4 months. No. 25 Warren street, three doors west of Broadway.]

NEW YORK, *October 8th*, 1867.

Mr. E. S. Oppenheimer, Julesburg, Cal., bought of Wise, Greenbaum & Co.:

298. 2	doz. Negligee	shirts,	cass.,	$28	.....	$56
211. 2	" "	"	"	33	.....	66
314. 1	" "	"	"		.....	33

311.	1	"	"	"	collars & pockets		36
299.	1	"	"	"	"		40
300.	$2\frac{3}{12}$	"	"	"	"	40	90
312.	3	"	"	"	"	40	120
313.	2	"	"	"	"	45	90
308.	1	"	"	"	"		45
304.	3	"	"	"	"	36	108
307.	1	"	"	"	"		50
267.	2	"	"	"	"	55	110
273.	1	"	"	"	"		55
278.	2	"	"	"	Beknop, $18.50		37
280.	1		overalls, D. S.				13
288.	2		Shaker flannel drawers, 22.50				45
288.	2		" "		under-shirts, 22.50		45
			2 cases, strapping and cartage				4
							$1,043

E. S. OPPENHEIMER,
Nebraska City, Neb.

STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered that on this 27th day of July, A. D. 1868,
26 before me, a notary public, personally appeared , who, being first duly sworn according to law, deposeth and saith that the foregoing and annexed account is correctly made out from the books of original entry of Wise, Greenbaum & Co.; that the goods were sold and charged at or about the time of their respective dates; that the amount demanded and now due by E. S. Oppenheimer to Wise, Greenbaum & Co., is the sum of $1,043, with legal interest thereon from the 8th day of February, 1868; that no part of the same has been ever paid or in any manner settled; and that there is no deduction, no offsets of any kind.

H. GREENBAUM.

Sworn and subscribed before me this 27th day of July, A. D. 1868. Witness my hand and seal.

[L. S.] WM. V. ARCHER,
Notary Public.

NOTE.—And on the said 1st day of August a precipe for a summons in this cause was also filed in the words and figures following, to wit:

ABRAHAM WISE, HERMAN GREENBAUM, Jacob Greenbaum, Moses Greenbaum, plaintiffs,
against
ELIAS S. OPPENHEIMER, DEFENDANT.

Issue summons in this cause returnable to first rule-day, endorsed on writ: "Suit brought to recover the price and value of divers goods, wares, and merchandise sold and delivered by plaintiffs to de-
27 fendant at his request. Sum demanded, one thousand and forty-three dollars, with interest thereon from the eight' day of February, now last past.

McLennan & Archibold, security for costs. August 1st, 1868.

McLENNAN & ARCHIBOLD,
Attorneys for Plaintiffs.

NOTE.—And in accordance with said precipe the following summons was issued in the words and figures following, to wit:

Summons.

STATE OF NEBRASKA,
County of Otoe, ss:

The people of the State of Nebraska to the sheriff of said Otoe County, greeting:

You are hereby commanded to notify Elias S. Oppenheimer, defendant, that he has been sued by Wise, Greenbaum & Co., plaintiffs, in the district court of the first judicial district in and for said Otoe County, and that unless he answers by the 31st day of August, A. D. 1868, the petition of said Wise, Greenbaum & Co., filed against him in the clerk's office of the said county, such petition will be taken as true and judgment rendered accordingly. You will make due return of this summons on or before the 10th day of August, A. D. 1868.

Witness my hand and the seal of said court at Nebraska City, this first day of August, A. D. 1868.

[COURT SEAL.] GUY A. BROWN, *Clerk.*

28 NOTE.—And the above summons was endorsed as follows, to wit:

Case No. 14, September term, 1868.

Summons.

WISE, GREENBAUM & CO. }
vs.
ELIAS S. OPPENHEIMER. }

Suit brought to recover the price and value of divers goods, wares, and merchandise sold and delivered by plaintiffs to defendant at his request, sum demanded one thousand and forty-three dollars, with interest thereon, from the eight' day of February now last past.

Attest: GUY A. BROWN, *Clerk.*
McLENNAN & ARCHBOLD,
Attorneys for Plaintiffs.

NOTE.—And the following return by the sheriff was also endorsed on said summons in words and figures, to wit: This summons came to hand on the 3rd day of August, A. D. 1868, at 9 o'clock a. m., and I executed the within command on the same day by delivering to and leaving with the within-named defendant, E. S. Oppenheimer, personally, a true copy of this summons, with all the endorsements thereon. Done in Otoe County, and State of Nebraska, the day and year first above written. Fees, $1.

J. W. MORSE, *Sheriff.*

29 NOTE.—And afterwards, on the 10th day of August, A. D. 1868, the following proceedings were had and done:

WISE, GREENBAUM CO. }
vs.
ELIAS S. OPPENHEIMER. }

And now on this day this cause came on to be heard, and the defendant appearing in his own proper person confessed that he owed the said plaintiffs the sum of eleven hundred and fifteen dollars and fifteen cents, and confessed judgment for said sum against himself and in favor of

the said plaintiffs. It is therefore considered and adjudged by court that said plaintiffs, Wise, Greenbaum & Co., have and recover of and from the said defendant, Elias S. Oppenheimer, the said sum of eleven hundred and fifteen dollars and fifteen cents, together with the costs of this suit, taxed at nine dollars and seventy-five cents, and that they have execution therefor.

NOTE.—And on the same day, to wit, August 10th, the following precipe for execution was filed in the words and figures following, to wit:

WISE, GREENBAUM & CO.
vs.
E. S. OPPENHEIMER.

The clerk will please issue execution in this cause directed to sheriff of Otoe Co., Neb., to execute.

McLENNAN & ARCHBOLD,
For Plaintiffs.

30 NOTE.—And on the same day, to wit, the 10th day of August, A. D. 1868, the following execution was issued in words and figures as follows, to wit:

Execution.

STATE OF NEBRASKA,
County of Otoe, ss:

The people of the State of Nebraska to the sheriff of said county of Otoe, greeting:

You are hereby commanded to cause to be levied of the goods and chattels in your county of E. S. Oppenheimer, the sum of one thousand one hundred and fifteen dollars and fifteen cents, which by the judgment of the district court within and for said county of Otoe, at the June term thereof, A. D. 1868, Wise, Greenbaum & Co. recovered against E. S. Oppenheimer, until paid, and also accruing costs thereon; and for want of goods and chattels to cause to be levied on the lands and tenements of the said E. S. Oppenheimer, and have that money before the said district court on or before the 9th day of October, A. D. 1868, to render unto the said Wise, Greenbaum & Co. the above amount, and have you then and there this writ and your doings under the same duly endorsed thereon.

Witness my hand and the seal of district court at Nebraska City, this 10th day of August, A. D. 1868.

[COURT SEAL.] GUY A. BROWN, *Clerk.*

31 NOTE.—And on the above execution the following return was made by the sheriff of Otoe County, Nebraska, in words and figures as follows, to wit:

WISE, GREENBAUM & CO.
vs.
E. S. OPPENHEIMER.

STATE OF NEBRASKA,
Otoe County, ss:

This execution came to hand this 10th day of August, A. D. 1868, at 5

o'clock p. m., and, according to the command thereof, I did, on the 10th day of August, A. D. 1868, levy the same upon the following-described goods and chattels, to wit, on the property described in the inventory attached in the case of Henry Siegel vs. E. S. Oppenheimer, and marked inventory, as the property of said defendant; and I caused an inquest to be made of William Fulton and Jacob Blum, two disinterested freeholders, who were residents of the said county of Otoe and State of Nebraska, and administered to them, severally, an oath impartially to appraise the said property; and I, together with the Fulton and Blum, did appraise the said goods and chattels, property above described, at the sum of four thousand and thirty-seven dollars and sixteen cents, such sum being the real value in money of the said property, as before described, which said appraisement was signed by me and said Fulton and Blum, freeholders aforesaid, respectively, and I forthwith deposited a copy of said appraisement in the office of the clerk of the district court of the county of Otoe, and did immediately advertise by causing public notice to be given in the daily and weekly Nebraska
32 City News, a daily and weekly paper printed in said county and State and in general circulation in said county as aforesaid, and for ten days, commencing on the 12th day of August, A. D. 1868, and ending on the 24th day of August, A. D. 1868, that said goods and chattels would be sold at public auction at the store-room heretofore occupied by the said E. S. Oppenheimer in Nebraska City, Otoe County, State of Nebraska, on the 24th day of August, A. D. 1868, at 10 o'clock a. m. of said day, and I did, at the time and place so advertised, sell a portion of said goods and chattels, for cash in hand, at public auction; and, for want of time to sell the remainder, I did adjourn the sale until the 25th day of August, A. D. 1868, at 9 o'clock a. m., at which time and at the same place I proceeded to sell, in the same manner as before, a part of the remaining portion; and, for want of time to complete the sale, I adjourned the said sale until the 27th day of August, A. D. 1868, at 9 o'clock a. m., at which time and same place I did complete and sell the remainder in the same manner as before, as shown by the attached memorandum in the case Henry Siegel vs. E. S. Oppenheimer, and marked "Exhibit B," to the parties therein mentioned, for the sum of forty-four hundred and ninety-one dollars and fifteen cents, that sum being above two-thirds of its appraised value and the highest and best bid therefor; which said sum of moneys, the proceeds of said sale, I divided between this and nine other executions against the same defendant, and which came to my hand on the same day and hour, and for the following amounts:

SIEGEL & GREENBAUM	Jud.,	$4,209 66 c.
vs.	Paid,	$1,431 28 c.
E. S. OPPENHEIMER.	Costs,	$94 84 c.
LEON FRANKSON	Jud.,	$1,251 86 c.
vs.	Paid,	$425 63 c.
SAME.	Costs,	$39 23 c.
33 GREENBAUM & COHEN	Jud.,	$1,088 13 c.
vs.	Paid,	$369 86 c.
SAME.	Costs,	$32 90 c.
L. WOLFSHEIMER & Co.	Jud.,	$1,064 00 c.
vs.	Paid,	$361 76 c.
SAME.	Costs,	$35 08 c.

HENRY SIEGEL	Jud.,	$1,147 75 c.
vs.	Paid,	$390 23 c.
SAME.	Costs,	$35 29 c.
WEITE, ROSENBERGE & CO.	Jud.,	$757 58 c.
vs.	Paid,	$257 57 c.
SAME.	Costs,	$27 85 c.
A. SCHMIDT & CO.	Jud.,	$561 10 c.
vs.	Paid,	$190 77 c.
SAME.	Costs,	$19 50 c.
A. OPPENHEIMER	Jud.,	$1,213 33 c.
vs.	Paid,	$412 53 c.
SAME.	Costs,	$36 72 c.
MOSES RING	Jud.,	$801 20 c.
vs.	Paid,	$272 40 c.
SAME.	Costs,	$36 40 c.
WISE, GREENBAUM & CO.	Jud.,	$1,115 15 c.
vs.	Paid,	$379 14 c.
SAME.	Costs,	36 28 c.

34 The sum of $379 14 c., applicable on the execution, after deducting the costs in this case, $36 28 c., I paid over to Wm. McLennan, the attorney for the plaintiffs, taking his receipt therefor. I find no other property of defendants in my county.

J. W. MOORE, *Sheriff.*

STATE OF NEBRASKA,
County of Otoe, ss:

I, George R. McCallum, clerk of the county, and ex-officio clerk of the district court, 1st judicial district, State of Nebraska, in and for the county of Otoe, do hereby certify the foregoing to be a complete and correct transcript of the records of this office and of said court in the case above mentioned, wherein Wise, Greenbaum & Co. are plaintiffs, and Elias S. Oppenheimer is defendant.

In witness whereof I have hereunto set my hand and the seal of the said court, this 24th day of February, A. D. 1870.

[SEAL OF COURT.] GEO. R. McCALLUM, *Clerk.*

STATE OF NEBRASKA,
County of Otoe, ss:

I, Oliver P. Mason, sole presiding judge of the 1st judicial district of said county and State, do hereby certify that George R. McCallum, whose name appears in the foregoing transcript, is clerk of said court, and that his name as appears above is genuine, and that the attestation of said clerk is in due form according to the law and statutes of the State.

Fees, $15.00, paid by Smith & Scofield.

O. P. MASON,
Chief Justice of Nebraska, and Presiding Judge First Judicial District Nebraska.

35 Supreme court of the State of New York, for the county of New York.

WILLIAM H. HOOVER, AS ASSIGNEE IN BANKruptcy of Elias S. Oppenheimer, a bankrupt, plaintiff,
against
ABRAHAM WISE, HERMAN GREENBAUM, MOSES Greenbaum, and Jacob Greenbaum, defendants.

Interrogatories to be annexed to a commission in this action directed to James Sweet, esq., of Nebraska City, in the State of Nebraska, to examine on oath as witnesses in this action in behalf of the plaintiff, the following persons, to wit:

W. McLennan & Archibold, lawyers, composing the firm of McLennan & Archibold, doing business at Nebraska City aforesaid.

First. What is your name, age, occupation; and are you acquainted with the parties to this action, or either and which of them?

Second. Are you an attorney and counsellor at law, practising at Nebraska City, and how long have you been practising there?

Third. Have you a partner; and, if so, what is your firm-name, and how long has your firm existed?

Fourth. State whether or not you at any time brought an action for the defendants in this action, Wise, Greenbaum & Co. against Elias S. Oppenheimer; and, if so, when and where, and for what?

36 Fifth. Who employed you to bring said action and collect the claim; and where did the parties so employing you then reside, and what was their business?

Sixth. State whether you prosecuted the claim to judgment. Also whether you issued execution on the judgment to the sheriff. Also how much the sheriff or officer collected on the execution.

Seventh. State whether you collected any money from the said Elias S. Oppenheimer for Wise, Greenbaum & Co., of New York; and how much, if any; and when and how you collected it or received it.

Lastly. Do you know any other matter or thing touching the matters in difference in this case that may be of benefit or advantage to the plaintiff? If so, state the same fully and at large, as if you had been particularly interrogated thereto.

BROWN & ESTES,
Plaintiff's Attorneys.

Supreme court of the city and county of New York.

WILLIAM H. HOOVER, AS ASSIGNEE IN BANKruptcy of Elias S. Oppenheimer, a bankrupt, plaintiff,
against
ABRAHAM WISE, HERMAN GREENBAUM, MOSES Greenbaum, and Jacob Greenbaum, defendants.

Cross-interrogatories of defendant H. Greenbaum.

Cross-interrogatories to be administered on behalf of the defend-
37 ant Herman Greenbaum to W. McLennan and Archibold, lawyers, composing the firm of McLennan & Archibold, doing business at Nebraska City, State of Nebraska.

First cross-interrogatory, in addition to the 1st direct interrogatory. Did you see any of the defendants? If so, when and where, and whom did you see?

Second cross-interrogatory. If, in answer to the 5th direct interrogatory, you state you were employed by the defendants, then also state how and by whom of them were you retained or authorized to commence the action? If you were authorized by parole, state who of them authorized you, and what the person or persons who authorized you said, in full. If you were authorized by letter, or otherwise, in writing, annex such written authority hereto. State also what the grounds of your knowledge are. If you have no knowledge, but merely information, who informed you, and how?

Third cross-interrogatory. If you state, in answer to the 6th direct interrogatory, that you prosecuted the claim to judgment, then state if there was any defence to the action. State fully what proceedings were had in the case; when judgment was entered, execution issued, and when the sheriff made his return.

Fourth cross-interrogatory. If, in answer to the 7th direct interrogatory, you say that you collected any money for Wise, Greenbaum & Co., do you mean anything else except that you collected it in said action, or upon the said execution? If you say that you collected any money, what did you do with it? State fully, and annex copies of all letters written by you in anywise relating to the same. State also to whom and how you paid the same.

38 Lastly, do you know of anything concerning the matters in question that may tend to the benefit and advantage of the defendant, Herman Greenbaum? If yea, declare the same fully and at large, as if you had been particularly interrogated concerning the same.

KAUFMANN, FRANK & WILCOXSON,
Attorneys for Defendant, Herman Greenbaum,
New York City.

Deposition of EDWARD ARCHIBOLD, of Nebraska City, Otoe County, and State of Nebraska, aged forty years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the plaintiff, doth depose and say as follows:

First. To the first interrogatory he saith: My name is Edward Archibold. I am upwards of fifty years of age, right smart. I am an attorney at law, and am a member of the firm of McLennan and Archibold. I am not personally acquainted with any of the parties to this action. I have had, as a member of the firm of McLennan and Archibold, some correspondence with some of them.

Second. To the second interrogatory he saith: I am an attorney and counsellor at law, and am and have been practising in that profession at Nebraska City, in the State of Nebraska, since the third day of June, in the year one thousand eight hundred and sixty-eight.

Third. To the third interrogatory he saith: I have a partner; his name is the honorable William McLennan, and our firm has existed since June third, eighteen hundred and sixty-eight.

Fourth To the fourth interrogatory he saith: We did bring action for debt in favor of Wise, Greenbaum & Co., a firm composed of
39 Herman Greenbaum, Abraham Wise, Jacob Greenbaum, and Moses Greenbaum, as plaintiffs, against Elias S. Oppenheimer, on an account for goods sold and delivered, in the Otoe County district court, in Nebraska City. The process was issued, I think, either on the 7th or 8th day of July, 1868, and judgment was obtained as early as in

August, 1868. This account was for one thousand and forty-three dollars. The judgment was for that amount, and something more being for interest added.

Fifth. To the fifth interrogatory he saith: I suppose nobody but the plaintiffs. I know no others in the matter. They resided in the city of New York, and I took them to be merchants.

Sixth. To the sixth interrogatory he saith: We prosecuted the claim to judgment, and to execution also. We issued execution on the judgment to the sheriff of Otoe County, in the State of Nebraska; the sheriff collected, on the execution so issued, the sum of three hundred and forty-two dollars, and eighty-six cents.

Seventh. To the seventh interrogatory he saith: We, McLennan and Archibold, collected from Elias S. Oppenheimer, for Wise, Greenbaum & Co., of the city of New York, the sum of three hundred and forty-two dollars and eighty-six cents, by execution in the hands of the sheriff of Otoe County. He, the sheriff, sold the goods of Elias S. Oppenheimer on the execution, and on the 3d day of September, eighteen hundred and sixty-eight, the sheriff paid to us the money so collected, to wit: $342.86.

Lastly. To the last interrogatory he saith: I do not; except my impression and memory is, we charged only thirty-four or thirty-five dollars in money, and we retained that; and the balance, it is my impression, was paid over almost immediately to Wise, Greenbaum & Co., by Mr. McLennan, and it is my impression that Elias S. Oppenheimer became totally insolvent, and remains insolvent yet.

40 I have examined the law docket of McLennan and Archibold, and by way of correction of my answer to the fourth interrogatory, I wish to say, the petition in the case of Wise, Greenbaum & Co., against Elias S. Oppenheimer, was filed on the 1st day of August, 1868, and summons was issued the same day. We had brought a suit against Elias S. Oppenheimer, in favor of Lien, Franks & Co., on the 8th day of July, 1868, and that suit was in my mind when I made the answer.

To the first cross-interrogatory he saith: I never saw Wise, or either of the Greenbaums; never saw any one of them.

To the second cross-interrogatory, he saith: I do state we were retained, I have no doubt, by Wise, Greenbaum & Co.; the petition is in my own handwriting, sworn to by Mr. McLennan, my law-partner, and filed the 1st day of August, 1868; the account for goods delivered by the then plaintiffs to the then defendant, E. S. Oppenheimer, was verified by H. Greenbaum, on the 27th day of July, 1868, in the State, city, and county of New York, as the affidavit entitles itself, before W. M. V. Archer, who subscribes himself notary public, but he puts a seal of wax, in which he styles himself W. M. V. Archer, commissioner of deeds for the State of Nebraska; the affixing of this seal instead of a notarial seal, we regarded as a piece of inadvertence.

It must have come in a letter with the directions to sue, for in the then state of the mails, it was pretty speedy to get to this city between the 27th day of July and the 1st day of August. We had no previous acquaintance with Wise, Greenbaum & Co., and no means of knowing their names, and especially no means of knowing that Oppenheimer was indebted to them, except by instructions by letter, but I have not preserved the

41 letter. In a practice of twenty-five years it is the first intimation I ever had that the preservation of such a letter would be of the slightest importance. I have knowledge, for it was impossible to know their names, or their demands, unless they had written to us. H. Greenbaum swears, in the affidavit before spoken of in the answer to

this interrogatory, that E. S. Oppenheimer was indebted to them in the sum of one thousand and forty-three dollars, for goods in the schedule accompanying his affidavit, delivered to him on the 8th day of October, 1867, that there were no credits or payments, and that the account ought to draw interest from the 8th day of February, 1868; a great many suits were pending against Oppenheimer, in the management of other counsel, and one other suit in our own management. We were afraid, therefore, that if the suit went on to maturity, without judgment, everything would be swept away by the other claims, leaving nothing for Wise, Greenbaum & Co., so we applied to Elias S. Oppenheimer to confess judgment. He did so, without much apparent reluctance, and without difficulty, and accordingly judgment was entered on his confession, for the whole amount of the demand, with accruing interest, from the 8th day of February, 1868, amounting to $1,115.51, besides costs.

Third cross-int. To the third cross-interrogatory he saith: There was no defence, for he confessed judgment, as before stated in my answer to the second cross-interrogatory; execution was immediately issued to the sheriff of Otoe County, and, if I am not much mistaken, it was dated on the 10th day of August, 1868. On the 3d day of September following the sheriff paid as the percentage to which the judgment was entitled, amounting, as before stated, to $342.86.

Fourth cross-int. To the fourth cross-interrogatory he saith: The sheriff handed the money to my partner, Hon. William McLennan, and personally I do not know of his remitting the proceeds, except
42 from his contemporary conversations and declarations. But this is not to be understood as implying any doubt in my mind that the proceeds were remitted to the plaintiffs, Wise, Greenbaum & Co., after deducting our fees. Such are our uniform habits. I have never myself detained the proceeds of collections when paid to me as much as thirty-six hours. If paid early in the day I remit by the same day's mail; if late in the day, I remit by the next day's mail. As to letters, Mr. McLennan is now absent. In September, 1868, we had different boxes in the post-office. We did not use the same box until January, 1869. The acknowledgment of receipt may have been put into his box, and he perhaps can explain. I gave myself but little concern about the matter after the remittance was made, for I had unlimited confidence in Mr. McLennan's honesty, integrity, and correct business habits.

Lastly. To the last cross-interrogatory he saith: Elias S. Oppenheimer was overwhelmed with debts, and when we got the claim was about to be overwhelmed with judgments, and it was nothing but a race of diligence between creditors, and we think them entirely justified in getting what they could.

EDWARD ARCHIBOLD.

Examination taken, reduced to writing by me, and by the witness subscribed and sworn to before me this 19th May, 1870.

JAMES SWEET,
Commissioner.

WILLIAM MCLENNAN, of Nebraska City, Otoe County, and State of Nebraska, aged forty years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the plaintiff, doth depose and say as follows:

43 First. To the first interrogatory he saith: My name is William

McLennan. My occupation is practicing law. My age is between forty and fifty years. I am acquainted with the plaintiff William H. Hoover. I am not acquainted with either of the defendants.

Second. To the second interrogatory he saith: I am an attorney at law, practicing in Nebraska City, and have been practicing there the last sixteen years.

Third. To the third interrogatory he saith: I have a partner. The firm name is McLennan & Archibold, and the firm has existed for two years.

Fourth. To the fourth interrogatory he saith: We brought an action for the plaintiffs, Wise, Greenbaum & Co., against Elias S. Oppenheimer, in the district court of Otoe County, Nebraska, in the year eighteen hundred and sixty-eight. This action was brought to recover the price of goods sold and delivered by the said plaintiffs to Oppenheimer.

Fifth. To the fifth interrogatory he saith: Ledyard, Archer & Co., employed us to collect the claim. They resided at that time in the city of New York. Their business was collecting and commercial agents.

Sixth. To the sixth interrogatory he saith: We prosecuted the claim to judgment, and had an execution issued directed to the sheriff of Otoe County. I cannot tell the exact amount the sheriff collected without seeing the return—as, after paying all costs of collection, attorney fees, etc., we remitted to Ledyard, Archer & Co., for the use of the defendants, Wise, Greenbaum & Co., by draft on New York, two hundred and thirty-five dollars.

Seventh. To the seventh interrogatory he saith: We collected the amount above stated from Elias S. Oppenheimer for Wise, Greenbaum & Co., by sale of property on execution in the hands of the sheriff of Otoe County, in 1868.

44 Lastly. To the last interrogatory he saith: I know nothing.

First cross-int. To the first cross-interrogatory he saith: I never saw any of the defendants at any time or place, to my knowledge.

Second cross-int. To the second cross-interrogatory he saith: We were employed by Ledyard, Archer & Co. We were employed by letter from Ledyard, Archer & Co., and I have not now the letter in my possession.

Third cross-int. To the third cross-interrogatory he saith: We prosecuted the claim to judgment—there was no defence to the action. Judgment was entered and execution issued in July or August, 1868. The sheriff made his return of the execution within sixty days of the entry of said judgment.

Fourth cross-int. To the fourth cross-interrogatory he saith: I mean to say we collected no money except the money collected by the sheriff on execution in favor of Wise, Greenbaum & Co., against Elias S. Oppenheimer. We remitted said money after paying the expenses to Ledyard, Archer & Co., in the city of New York, by draft on New York. I have not in my possession copies of any of the letters remitting the same.

Last cross-int. To the last cross-interrogatory he saith: I know nothing.

WILLIAM McLENNAN.

Examination taken, reduced to writing by me, and by the witness subscribed and sworn to this 19th day of May, A. D. 1870, before me.

JAMES SWEET,
Commissioner.

45 The plaintiff then called as witness on his behalf WILLIAM V. ARCHER, who being duly sworn, deposed as follows:

I live at 7 Waverly Place, New York City; was formerly of Ledyard, Archer & Co., of New York; did business in New York in 1868. I knew Herman Greenbaum. I understood he was of the firm of Wise, Greenbaum & Co., of New York. They were merchants. Ledyard, Archer & Co. were law and collection business. I received for collection a claim from Wise, Greenbaum & Co., against E. S. Oppenheimer, of Nebraska City, *for collection*. Our firm received it, as near as I remember, in July, 1868. I was in the store of Wise, Greenbaum & Co. Greenbaum asked me if I knew anything of Oppenheimer. I said I did not, but would ascertain. I accordingly wrote to our correspondent in Nebraska about it. I took pains to inquire about Oppenheimer. I told Greenbaum that if the claim was sent on at once, I thought he could make it. That was the substance of the information I had received. The account was then made out and put in my hands. The account was made out and verified by Greenbaum, one of the defendants. This was towards the end of July, 1868. I forwarded the account to McLennan, a lawyer at Nebraska City.

Q. With what instructions?

(Objected to by defendant's counsel.)

Excluded.

Q. What did you next ascertain and communicate to Herman Greenbaum, if anything?

(Objected to by defendant's counsel.)

Admitted as far as to any communication made to Greenbaum—rest excluded.

46 A. I told Greenbaum that I had received a letter from the correspondent at Nebraska City; that judgment had been obtained against Oppenheimer in favor of Wise, Greenbaum & Co., and I hoped to make the money or the greater part of it. That if the claim had been received sooner there might have been no doubt of it. When I communicated this I had the letter of McLennan in my hand and communicated it to him.

I do not remember what else I said to him after this lapse of time. I do not remember that I said anything else to him.

Q. Did or did you not state to him anything about another judgment or judgments being obtained against Oppenheimer?

(Objected to as leading.)

Allowed—Exception by defendants.

A. I think so; I told him there were other judgments against him at this time. I think I had this conversation some time in August, 1868, about three weeks after the claim was first sent out. About the middle or end of August a part of the money was collected and remitted to our firm on the judgment—$235.00 was the amount.

Cross-examined by Mr. Frank:

The money remained in our hands, and was not paid over. It went in the usual course of business. The money was used for our office purposes and other purposes. Our usual charges for collection sometimes five, sometimes ten per cent. Our firm does not now exist. The firm has failed to come up to our obligations; in other words

47 failed. William N. Ledyard, of Philadelphia, is in possession of our books and papers. Mr. Martin was in the office, but whether or not he heard the conversation between myself and Greenbaum I cannot tell.

Re-examined by Mr. Estes:

The account was past due, considerably so, when placed in our hands.

Defendant admits that before suit brought, the plaintiff demanded the money in controversy from the defendants, and that plaintiff claimed it as the assignee in bankruptcy, as mentioned in the complaint.

Plaintiff now rests.

Mr. Frank, for defendant, moves for a dismissal of the complaint.

1. Evidence shows that defendant never received the money, and that under the bankrupt law the assignee can only follow the fund.

2. There is no evidence of fraud on the part of the defendant, or any person employed by him; no notice has been shown of knowledge of the insolvency of Oppenheimer & Co., when the suit was commenced or judgment entered.

3. It has not been shown that defendant in person had any knowledge of the insolvency or authorized any person to commit a fraud; powers have to be strictly construed.

Defendant opened his case by calling for the defence Herman Greenbaum, who being duly sworn, deposed:

48 I am one of the defendants. I had a claim against Oppenheimer; claim in controversy for goods sold to Oppenheimer in 1867. I gave the claim to Ledyard, Archer & Co. for collection. They were collection agents in New York. I gave it to them in 1868, about June. I had no knowledge at that time of the financial condition of Oppenheimer. I gave them no directions, except to try their best to collect it. They told me they would send it out. I think they told me afterwards, about a month afterwards, that they had sued and would obtain judgment—I do not remember. I did not know that other suits had been brought against him at that time. I did not know, and had no information, of any claims or judgments against Oppenheimer at the time, nor did I know what lawyer in Nebraska had charge of the claim against Oppenheimer. I had no correspondence before judgment with any lawyer in Nebraska in regard to the claim. I gave no instructions except such as I have already mentioned in regard to the claim.

I did not hear of the claim particularly after I left it for collection, until Mr. Estes came to us about the money. Having heard nothing from Ledyard, Archer & Co. for some time, I called on them at their office repeatedly. I did not see them; their office was closed. I did nothing more. I could not find Ledyard & Co. I did not receive the money on the claim at all.

Q. Did you know or hear of Oppenheimer making or confessing any judgment in your favor for the claim left with Ledyard, Archer & Co., before it was so confessed?

Objected to by Mr. Estes.

Overruled; evidence admitted; plaintiffs' counsel excepts.

A. I did not.

Cross-examined by Mr. Estes:

49 Our business in 1867 was manufacturing and selling to people in different States. I made an affidavit so that Ledyard & Co. could collect the claim. I placed the same in the hands of Ledyard, Archer & Co., so that they could sue and collect. The account which I swore to showed when I sold the goods. I have no independent recollection when the goods were sold. I suppose, in looking at the copy of the account, that the goods were sold at that time, viz, the 8th day of October, 1867. I have no exact recollection; no. I think the account

was sworn to on the 24th day of July, 1868, and handed to Ledyard, Archer & Co. I think the goods were sold on four months' credit. That would make the account due on the 8th of February, 1868.

Shortly after the account became due, we wrote to Oppenheimer for payment. I never wrote to him again, that I remember. He sent an answer in which he said, in substance, that business having been very dull, he would thank us to wait on him, and he would send the money in a short time. Oppenheimer never remitted anything. The business of Ledyard, Archer & Co. was to take claims for collection in different parts of the country, and, if necessary, have them sued. When I sent the account to Ledyard, Archer & Co. I think it was nearly six months past due.

Defendants rest.

A commission was issued to Baltimore on behalf of the plaintiff by which depositions of witnesses residing at Baltimore, Maryland, were taken, and were put in evidence on the trial as follows:

50 Supreme court.

WILLIAM H. HOOVER, AS ASSIGNEE IN BANKRUPTCY of Elias S. Oppenheimer, a bankrupt, plaintiff,

against

ABRAHAM WISE, HERMAN GREENBAUM, MOSES Greenbaum, and Jacob Greenbaum, defendants.

Interrogatories to be administered to William Miller and Jacob Miller, Moses Hecht, B. Burgunder, and Christian Rogge, under and by virtue of a commission issued out of the supreme court of the State of New York, directed to Wm. L. Dallam, of the city of Baltimore, commissioner.

First. What is your name, age, occupation, and residence, and do you know the parties to this action or either or any of them? and, if so, which of them, and how long have you known them?

Second. State what, if anything, you know as to the insolvency of Elias Oppenheimer, of Nebraska, in the years 1867, 1868, 1869, and 1870.

Third. State the name of the firm of which you are a member, and what your business is, and whether or not said Oppenheimer is or has been a debtor of yours, and to what amount; when the debt accrued; what for; the amount of it; and whether it has ever been put in judgment; and whether you have received any portion of the same, collected on execution.

51 Fourth. Do you know any other matter or thing that may tend to the benefit or advantage of the plaintiff in this action? And, if so, state the same fully and at large, as fully as if you had been particularly interrogated thereto.

BBOWN & ESTES,
Plaintiff's Attorneys.

New York supreme court.

WILLIAM H. HOOVER, AS ASSIGNEE IN BANKRUPTCY of Elias S. Oppenheimer, a bankrupt, plaintiff,
against
ABRAHAM WISE, HERMAN GREENBAUM, Moses Greenbaum, and Jacob Greenbaum, defendants.

An order having been made herein on the 5th day of June, 1871, that a commission be issued by plaintiff to Baltimore, Maryland, directed to Wm. L. Dallam, esq., and said commission having been granted without any stay:

Now, therefore, we, the undersigned, hereby consent that the said commission be made returnable to Judge Van Vorst, the referee in this action, but reserving to ourselves the right to exceptions to any irregularities.

Dated New York, June 7th, 1871.

KAUFMANN, FRANK & WILCOXSON,
Attorneys for Defendant Herman Greenbaum.

52 Supreme court.

WILLIAM H. HOOVER, AS ASSIGNEE IN BANKRUPTCY of Elias S. Oppenheimer, a bankrupt,
against
ABRAHAM WISE, HERMAN GREENBAUM, Moses Greenbaum, and Jacob Greenbaum.

Deposition of witnesses produced, sworn, and examined the 12th day of June, 1871, at No. 7 Courtland street, Baltimore City, State of Maryland, under and by virtue of a commission issued out of the supreme court of the State of New York, in a certain cause therein pending and at issue between William H. Hoover, assignee, plaintiff, and Abraham Wise et al., defendants, as follows:

WILLIAM MILLER, of Baltimore City, Maryland, late of the firm of Metzger & Miller, wholesale clothiers, aged 32 years and upwards, being duly and publicly sworn pursuant to the directions hereto annexed and examined on the part of the plaintiff, doth depose and say as follows:

First. To the first interrogatory he says: My name is William Miller. I am 32 years of age, and I am of the city of Baltimore, in the State of Maryland, and I am of the late firm of Metzger & Miller, wholesale clothiers. I am at present of the firm of Miller & Bros., clothiers. I do not know any of the parties to this action.

53 Second. To the 2d interrogatory he saith: I had dealings with Elias Oppenheimer in 1867. On the 3d of October of that year I sold him, acting as partner in the firm of Metzger and Miller, a bill of goods amounting to eight hundred and fifty-four dollars and twenty-five cents. I made efforts to collect this bill, but could never succeed in so doing. A copy of this bill is herewith annexed, marked "Exhibit A."

Third. To the third interrogatory he saith: Part of this I have an

swered above. I never obtained a judgment against said Oppenheimer, nor have I ever received any portion of said bill, either on execution or otherwise.

Fourth. To the fourth interrogatory he saith: I know nothing further.

WM. MILLER.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 12th day of June, A. D. 1871, before me.

WM. L. DALLAM,
Commissioner.

BENJAMIN BURGUNDER, of Baltimore, Maryland, aged 60 years and upwards, being duly and publicly sworn pursuant to the directions hereto annexed, and examined on the part of the plaintiff, doth depose and say as follows:

To the 1st interrogatory he saith: My name is Benjamin Burgunder. I am 60 years of age; and am of the city of Baltimore, Maryland, and of the firm of Burgunder, Ambach & Co., clothiers. I do not know any of the parties to this suit.

54 To the 2d interrogatory he saith: I know that he bought goods in 1867, and never paid for the same.

To the 3d interrogatory he saith: I am of the said firm of Burgunder, Ambach & Co. In 1867 I was of the firm of Burgunder & Co. In October of that year said Elias Oppenheimer bought of said firm a bill of goods amounting to eight hundred and thirty-six dollars and twenty-five cents, which the said firm has never succeeded in collecting, owing to the property of said Oppenheimer having been taken on prior confessed judgments. The said claim of Burgunder & Co. was never sued upon, nor was any portion of it ever collected, on judgment or otherwise.

A copy of said bill is herewith filed, and marked "Exhibit B."

Subscribed and sworn to the 12th day of June, 1871, before Wm. L. Dallam, commissioner.

BENJ. BURGUNDER.

JACOB MILLER, of Baltimore, Maryland, oyster and fruit packer, aged 29 years and upward, being duly and publicly sworn pursuant to the directions hereto annexed, and examined on the part of the plaintiff, doth depose and say as follows:

First. To the 1st interrogatory he saith: My name is Jacob Miller. I am 29 years of age; and am a member of the firm of Miller, Schœnberg & Co., oysters and fruit packers, of Baltimore, Maryland. I do not know any of the parties to this suit.

Second. To the 2d interrogatory he saith: I know that said
55 Elias Oppenheimer contracted debts and bought goods in Baltimore in 1868, and never paid or settled for the same.

Third. To the 3d interrogatory he saith: I am senior partner of the firm of Miller, Shœnberg & Co., referred to above. In the months of June and July, 1867, said Oppenheimer bought goods of French, Schœnberg & Co. to the amount of eleven hundred and twenty-two dollars and fifty cents, a bill of which is hereto annexed, marked "Exhibit C." These goods were never paid for, and on the first day of January, 1868, when I became a member of said firm of French, Schœnberg & Co., constituted part of their assets. In October or November, 1868, the present firm of Miller, Schœnberg & Co., was formed. This claim against the said Oppenheimer was never sued on, as all his assets had been

seized under prior judgments, nor has there been any thing collected on it, on execution or otherwise.

Fourth. To the 4th interrogatory he saith: I do not.

JACOB MILLER.

Subscribed and sworn to this 13th day of June, 1871, before

WM. L. DALLAM,
Commissioner.

CHARLES SPILKER, of Baltimore, Maryland, importer of fancy goods, aged 28 years, and upwards, being duly and publicly sworn pursuant to the directions hereto annexed, and examined on the part of the plaintiff, doth depose and say as follows:

First. To the 1st interrogatory he saith: My name is Charles
56 Spilker; aged 28 years and upwards; I am a resident of Baltimore, Maryland; and am junior member of the firm of Charles Spilker & Co., importers of fancy goods; I do not know any of the parties to this action.

To the 2d interrogatory he saith: I know that said Elias Oppenheimer purchased goods in Baltimore, in 1867, and never paid for the same, and in the spring of 1868 the firm of Charles Spilker & Co. received the usual notice of his having taken the benefit of the bankrupt act.

Third. To the third interrogatory he saith: I am a member of the firm of Charles Spilker & Co. In 1867 said firm sold to said Oppenheimer, in October of that year, a bill of goods amounting to two hundred and eighty-three dollars and twenty-five cents, a copy of which bill is hereto annexed, and marked "Exhibit D." Said goods were delivered to and received by said Oppenheimer, but never paid for. The claim was never sued upon, nor was any portion ever paid, on execution or otherwise. The firm of Charles Spilker & Co. consists of Christain Rogge and myself. Christian Rogge is at present in Europe.

Fourth. To the 4th interrogatory he saith: I do not.

CHAS. SPILKER.

Subscribed and sworn to this 14th day of June, 1871, before

WM. L. DALLAM,
Commissioner.

57 Selig G. Putzel, of Baltimore, Maryland, of the firm of Hecht & Putzel, wholesale boot and shoe dealers, aged 48 years and upwards, being duly and publicly sworn pursuant to the directions hereto annexed, and examined on the part of the plaintiff, doth depose and say as follows:

First. To the 1st interrogatory he saith: My name is Selig G. Putzel; I am forty-eight years of age; a resident of Baltimore, Maryland; and a member of the firm of Hecht & Putzel, boot and shoe-dealers; I do not know any of the parties to this action.

Second. To the 2d interrogatory he saith: I know that said Elias Oppenheimer bought goods in Baltimore in 1867, and never paid for the same. The firm of Hecht & Putzel received in 1868 the usual notice that he had taken the benefit of the bankrupt act.

Third. To the 3d interrogatory he saith: As stated above, I am a member of the firm of Hecht & Putzel. In September, 1867, said Oppenheimer bought of said firm of Hecht & Putzel a bill of goods amounting to fourteen hundred and nine dollars and sixty-two cents, a copy of

which is hereto annexed, and marked Exhibit E. This bill has never been paid, nor has it been sued upon, as said Oppenheimer's assets had all been seized upon prior judgments. No portion of said bill has been received, either on execution or otherwise. My partner, Mr. Moses Hecht, is in Virginia at present.

SELIG G. PUTZEL.

Subscribed and sworn to this 14th day of June, 1871, before
WM. L. DALLAM,
Commissioner.

58 BALTIMORE, *Oct.* 2, 1867.

Mr. E. S. Oppenheimer, bought of Metzger & Miller, clothiers, No. 5 South Liberty street.

Terms cash.

2443.	10 cases suits	$15 50..	$155 00
2460.	6 brown "	13 50..	81 00
2451.	6 " "	15 50..	93 00
2469.	6 fancy cases, pants & vests	7 50..	45 00
2468.	6 " " " "	7 50..	45 00
2442.	6 bl'k doeskin s'ck coats	9 75..	58 50
2449.	10 Union suits	10 00..	100 00
"	6 " pants	2 50..	15 00
2420.	18 " "	2 50..	45 00
2461.	2 doz. blue jeans	27 00..	54 00
2450.	6 cass. suits	17 50..	105 00
2460.	4 brown "	13 50..	54 00
	2 cases coopering drge		3 75
			$854 25

(Signed) WM. MILLER.

EXHIBIT A.

At the execution of a commission for the examination of witnesses between Wm. H. Hoover, assignee, plaintiff, and Abraham Wise et al., defendants, this paper-writing was produced and shown to William Miller, and by him deposed unto at the time of his examination before
WM. DALLAM,
Commissioner.

BALTIMORE, *Oct.* 3, 1867.

59 *Mr. E. S. Oppenheimer, bought of B. Burgunder & Co.*

4 Mos.

771	6 suits	15 50..	$93 00
729	6 "	14 50..	87 00
609	3 overcoats	14 00..	42 00
641	10 suits	13 75..	137 50
772	12 pants	2 60..	30 00
636	6 pants and vest	6 25..	37 50
486 653	6 "	5 00..	30 00

493	12	"	2 00..	24 00
765	6	coats	12 50..	75 00
587	4	overcoats	9 50..	38 00
751	12	pants	2 33⅓.	28 00
	17	pants and vests	7 00..	119 00
	7	"	4 75..	33 25
	1	blk. s. velvet vest		6 00
	9	cass. pants and vest	8 50..	51 00
	2	boxes and dray		5 00
				$836 25

BENJAMIN BURGUNDER.

EXHIBIT B.

At the execution of a commission for the examination of witnesses between Wm. H. Hoover, assignee, plaintiff, and Abraham Wise et al., defendants, this paper-writing was produced and shown to Benjamin Burgunder, and by him deposed unto at the time of his examination before

WM. L. DALLAM,
Commissioner.

60 BALTIMORE, *June* 13, 1871.

Mr. E. S. Oppenheimer, bought of Miller, Schoenberg & Co., oyster and fruit packers, wharf, east end of Thames street.

1867. *Market price at that time.*

June	3.	80	cases–160 doz.	2 lb.	oysters @	2 50	$400 00
		20	" 40 "	1 lb.	"	1 50	60 00
July	27.	50	" 100 "	2 lb.	"	2 50	250 00
		50	" 100 "	"	strawberries	3 00	300 00
		25	" 50 "	"	green peas	2 25	112 50
							$1,122 50

JACOB MILLER.

EXHIBIT C.

At the execution of a commission for the examination of witnesses between Wm. H. Hoover, assignee, plaintiff, and Abraham Wise et al., defendants, this paper-writing was produced, and shown to Jacob Miller, and by him deposed unto at the time of his examination before

WM. L. DALLAM,
Commissioner.

61 BALTIMORE, Oct. 1, 1867.

Mr. E. S. Oppenheimer, Julesburg, Colorado. Bought of Chas. Spilker & Co., importers and jobbers of foreign and domestic fancy goods and toys. Terms ..... Shipped for your account and risk by N. C. R. R. Union Star Line. Payable in bankable funds.

The following goods were sold and delivered on a credit of four months:

1	card knives,	7		$10 50
1	do	do 68		10 50
1	do	do 202		13 00
½	doz.	do Wostenholm 11143	10 50 ..	5 25
½	do	do do 10812	16 00..	8 00

1	do	do	Ward 15276 and 15277			9 75
½	do	do	3788	6 00		3 00
½	do	do	6152	6 00		3 00
½	do	do	5109	6 50		3 25
½	do	do	Sportsman 800	22 50		11 25
1	do	do	3121			3 00
1	do	needles	3/0			1 25
1	doz.	walletts, calf	119			8 50
1	do	do	sheep 226			6 00
1	do	do	231			6 76
1	do	do	222 B			4 50
½	do	do morocco	1065	6 00		3 00
½	do	bill-books	238	9 00		4 50
¼	do	letter-books	4339	18 00		4 50
¼	gro.	Hogal cards d'ble, enameled		48 00		12 00
¼	do	do do		33 00		8 25
1	doz.	Harry VIII				6 00
½	do	cloth brushes	308	7 50		3 75
½	do	do do	40	3 00		1 50
1	do	tooth do	79			3 50
						$155 00

62 $155 00

	1 gro.	I. R. top leadpencils star			7 50
2	doz.	carpenters do	8½	62c	1 25
2	do	J. R. wallet bands		75c	1 50
1	gro	" "			2 50
1	doz.	" dressing combs	7½		1 50
1	"	" " "	8		1 62
1	"	metal back "	2970		3 75
2	"	hoan dressing "	7/1	1 50	3 00
1	"	buff pocket "	2523		1 50
1	"	hoan pocket combs, Siamese			1 50
1	J. R.	fine do	12		1 63
1	gro.	" redding do	3½	9 50	9 50
2	doz.	" pocket do	5	2 75	5 50
1	"	whisps			2 25
1	"	wood pipes, artillery			2 00
2	pce.	Meersch. do	1125	2 50	5 00
2	"	" do	957	2 00	4 00
2	"	" do	172281½	1 50	3 00
1	doz.	violin bases	38½		1 00
2	bundle	" strings E	64	3 50	7 00
1	"	" " A	150		2 50
1	"	" " D	250		3 50
1	pce	German accordeon	14¼		7 50
1	"	"	16		7 50
1	"	"	17		10 00
1	"	"	17½		11 00
1	"	Bussons	517		10 00
1	"	"	516		8 50
			Box and dray		1 25
					$283 25

CHAS. SPILKER.

63 EXHIBIT D.

At the execution of a commission for the examination of witnesses between Wm. Hoover, assignee, plaintiff, and Abraham Wise, et al., defendants, this paper-writing was produced and shown to Charles Spilker, and by him deposed unto at the time of his examination before

WM. L. DALLAM,
Commissioner.

BALTIMORE, *Sept.* 24, 1867.

Mr. E. S. Oppenheimer bought of Hecht & Putzel, wholesale dealers in boots and shoes:
Terms net cash.

Nos.	1.	2.	2c.	24 pr M. %	boots	3 63..	87 00
"		3.	1.	12 " " " wax	"	4 50..	54 00
"	4.	5.	2.	24 " " " "	"	4 50..	108 00
"		6.	1.	12 " " "	"	3 50..	42 00
"		7.	1.	12 " " "	"	3 37..	40 50
"	8.	9.	2.	24 " Sporten	"	5 25..	126 00
"	10.	11.	2.	24 " qr. "	"	5 00..	120 00
"		12.	1.	12 kip	"	4 50..	54 00
"		13.	1.	12 9/13	"	4 00..	48 00
"		14.	1.	25 M. 6/11 balm		1 60..	40 00
"		15.	16	2. 23 offic. S. boots		7 00..	161 00
"	17.	18.	2.	24 qr. p. H. "		5 00..	120 00
"		19.	1.	12 enamd		5 00..	60 00
"		20.	1.	12 C. chd		3 75..	45 00
"		21.	1.	12 9/13		3 75..	45 00
"		22.	1.	12 6/10		2 87..	34 50
"		23.	1.	12 Csd		5 25..	63 00
"		24.	1.	12 C. 1/M		4 25..	51 00
"		25.		6 p'r boots, job		5 00..	30 00
				24 M. kip Donelsons		2 25..	54 00
				12 "		1 87..	22 50
				stge chge			4 12
							$1,409 62

SELIG G. PUTZEL.

64 EXHIBIT E.

At the execution of a commission for the examination of witnesses between William H. Hoover, assignee, plaintiff, and Abraham Wise, et al., defendants, this paper-writing was produced and shown to Selig G. Putzel, and by him deposed unto at the time of his examination before

WM. M. DALLAM,
Commissioner.

WILLIAM H. HOOVER, ASSIGNEE, ETC., RESPONDENT,
against
HERMAN GREENBAUM, IMPLEADED, ETC., APPELLANT.

We consent that the following statement be made part of the case on appeal in this action, to wit:

That Elias S. Oppenheimer was duly adjudged a bankrupt, and the

plaintiff in this action duly appointed his assignee in bankruptcy, according to the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," within a period of less than four months next after the confession of the judgment by said Oppenheimer in favor of the defendants in this action, which said adjudication and assignment were in due and usual form, according to the act of Congress, and were put in evidence on the trial of this action.

BROWN & ESTES,
Plaintiffs' and Respondents' Attorneys.
KAUFMANN, FRANK & WILCOXSON,
Defendant and Appellants' Attorneys.

65 Supreme court.

WILLIAM H. HOOVER, ASSIGNEE IN BANKRUPTCY,
vs.
ABRAHAM WISE, HERMAN GREENBAUM, AND Jacob Greenbaum.

I, the undersigned, to whom this action was referred to hear and determine the same, do hereby certify and report that I have been attended by the parties and their attorneys, and have heard the proofs of the parties and the arguments of their counsel, and do find the following facts:

1. That on the 10th day of August, 1868, one Elias S. Oppenheimer, of the State of Nebraska, who was then insolvent, with the intent to give the defendants, who were his creditors, a preference over others of his creditors, confessed a judgment in favor of the defendants for the sum of eleven hundred and fifteen dollars and fifteen cents in the district court for the first judicial district of the State of Nebraska, in and for Otoe County of said State, in which court the judgment was duly entered up and perfected.

2. That subsequently, and on or about the 11th day of November, 1868, said Oppenheimer filed his petition and schedules in the district court of the United States for the district of Nebraska, therefore, and was duly adjudged a bankrupt, according to the provision of the bankrupt law. That four months had not elapsed between the confession of said judgment and the commencement of the proceedings in bankruptcy.

66 3. That the agents and attorneys of the defendants, who obtained for said defendants said confession of judgment, and who entered up and perfected said judgment, had at the time reasonable cause to believe that said Oppenheimer was insolvent at the time of such confession of judgment, and that said judgment was confessed and a preference given thereby to the defendants over the other creditors of Oppenheimer, in fraud of the provisions of the act to establish a uniform system of bankruptcy, passed March 2d, 1867.

4. That the said attorneys and agents of the defendants issued an execution on said judgment to the sheriff of the proper county in the State of Nebraska, and collected and received on account thereof and on said execution out of the proceeds of the sale of the property of said Oppenheimer, the sum of three hundred and seventy-nine dollars and fourteen cents.

5. That the plaintiff is the duly-appointed assignee in bankruptcy of Elias S. Oppenheimer, who has been duly decreed a bankrupt by the

said court in which his petition therefor was filed, and in pursuance of the prayer thereof.

6. That before the commencement of this action the plaintiff, assignee in bankruptcy as aforesaid, has demanded of the said defendants the said sum of three hundred and seventy-nine dollars and fourteen cents, and the defendant has refused to pay the same.

As conclusions of law I find and report:

That the plaintiff is entitled to recover of defendants the said sum of three hundred and seventy-nine dollars and fourteen cents, with interest thereon from the 1st day of October, 1869, besides the costs of this action.

New York, July 10th, 1871.

HOOPER C. VAN VORST,
Referee.

67 New York supreme court.

WILLIAM H. HOOVER, ASSIGNEE, ETC., PLAINTIFF,
vs.
HERMAN GREENBAUM AND OTHERS.

Opinion of the referee.

The defendants having a claim against Elias S. Oppenheimer of Nebraska City, amounting to $1,000 and upwards, for goods sold and delivered, which, though due, the debtor on application had failed to pay, towards the close of July, 1868, placed the same, verified by one of them, in the hands of Ledyard, Archer & Co., a law collecting agency in the city of New York, to be forwarded to Nebraska City for collection by suit. Said Ledyard, Archer & Co. transmitted the claim to a law firm in Nebraska City for collection. The lawyers in Nebraska City immediately and in the early part of August, 1868, brought an action upon the claim in the Nebraska court. Several other suits were at the same time pending against Oppenheimer, for the collection of claims against them in favor of other parties, one of which other suits was conducted by the same attorneys in Nebraska City who had the conduct of defendants' case against Oppenheimer. These, acting doubtless from what they supposed to be the intent of their clients, applied to Oppenheimer to confess a judgment in the defendants' favor, which he did on the 10th day of August without much apparent reluctance; judgment by confession was perfected on the same day for $1,115.15, and
68 execution was at once issued on the judgment to the sheriff. Under this execution, with nine others delivered to the sheriff on the same day and hour in favor of other parties, the sheriff levied upon and sold all the personal property of Oppenheimer, the judgment-debtor. The proceeds of the sale were duly apportioned pro rata by the sheriff among the various execution-creditors; the portion thereof endorsed as collected on the execution in the defendants' favor was the sum of three hundred and seventy-nine dollars and fourteen cents, which amount, less sheriff's fees $36.28, were paid over by the sheriff to the attorneys at Nebraska City, who had brought the action and conducted the proceedings there. These attorneys, after deducting their costs and commissions, remitted the amount to Ledyard, Archer & Co., the law collecting agents in the city of New York. Afterwards, and on the 11th day of November, 1868, and within 4 months after the confession of the judgment in defendants' favor, Oppenheimer filed his petition and went

into bankruptcy, and was adjudged and decreed a bankrupt according to the provisions of the bankrupt law. The assignee in bankruptcy demanded the moneys so collected on the judgment and execution in defendants' favor out of the bankrupt's property, and remitted by the Nebraska attorneys to the defendants' agents in New York, and failing to obtain the same, brings this action for the money.

Without doubt, the legal proceedings in the defendant's cause, which resulted in the confession of the judgment and the collection of the amount thereunder out of the sale of the property of Oppenheimer, had the effect to give defendants a perference over the other creditors who did not at the time stand in the same relation as judgment and execution creditors, and who did not participate in the proceeds of the bankrupt's property sold under the execution. By the provisions of the bankrupt-law an insolvent debtor is prohibited from confessing a judgment or from giving any such preference to any one creditor
69 over others, and the creditor who takes such confession is liable to refund to the assignee in bankruptcy, when appointed, what amount is collected and received out of the insolvent's estate by such means.

But whether the assignee can recover the money so received by a creditor, depends upon the fact as to whether or not the creditor, at the time of such confession of judgment in his favor, knew or had reasonable cause to believe the person confessing the judgment was insolvent, and whether the judgment was in fact confessed in fraud of the provisions of the bankrupt-law.

The defendants' counsel earnestly claims that there is no evidence of actual knowledge on the defendants' part of the insolvency of Oppenheimer, and that it is not proven that they had reasonable cause to believe he was insolvent when the judgment was confessed or enforced by the sale of his property under the execution.

Such knowledge in defendants of the insolvency of Oppenheimer, or of reasonable cause to believe same, must be established by the facts and circumstances of the case.

The facts bearing on this point are substantially as follows:

Defendants had themselves applied to the debtor for the payment of the claim, without success; and the same was overdue 4 months and upwards when they handed same to Ledyard, Archer & Co. for collection. At defendants' request, Ledyard, Archer & Co. had written to Nebraska for information in respect to the collectability of the demand, and defendants were advised by the collecting agency in New York, after they had so written, that if the claim were sent out at once they thought it could be collected; and after judgment had been ob-
70 tained, defendants were informed by the collecting agency in New York of the fact of the recovery of the judgment and of the expectation that the money, or the greater part of it, would be collected, and that if the claim had been sent out sooner there might have been no doubt on the subject.

These facts and circumstances were sufficient to raise in defendants' mind, and doubtless did, a reasonable ground of belief that the debtor was insolvent and unable to pay the debt in full before the money was collected on the confessed judgment, and in fact at the time of its confession. I am satisfied from the evidence that the attorneys and agents of the defendants had knowledge of the insolvency of the debtor at the time of the confession of the judgment. The Nebraska attorneys have themselves assigned as the reason why they applied to Oppenheimer for

the confession of the judgment that they were fearful that if they waited to obtain judgment in the usual way all the property of the debtor would be swept away by the other claimants, leaving nothing for the defendants.

These attorneys knew of the pendency of actions in favor of other creditors, and were themselves conducting one of such actions in which there appeared to be a struggle as to which should first obtain judgment. These defendants must be held responsible for the knowledge and acts of their agents and attorneys, and they themselves put this whole proceeding in motion, which resulted in the confession of the judgment in their favor. The acts of the attorneys in Nebraska, as well as of the collection agency in New York, are the acts of the defendants. These persons were all engaged in the very business for which they were employed, the collection of the debt by proceedings at law, and for whatever was done in the conduct of the business in the way in which it was done the defendants are liable.

71 It appears that although the Nebraska attorneys transmitted the amount received on the execution in the defendant's favor to Ledyard, Archer & Co., the latter firm have not in fact paid over the same to the defendants, but have used the moneys in their business and have themselves become insolvent and unable to respond to the defendants for the same.

But I do not regard the liability of defendants as depending upon the fact as to whether or not Ledyard, Archer & Co. have actually paid over the moneys to defendants. The money was collected out of the insolvent's property by the agents of the defendants, and it was so received by them to the defendants' use, and they are liable to the defendants therefor.

New York supreme court.

WM. H. HOOVER, ASSIGNEE, ETC., PLAINTIFF and respondent,
against
HERMAN GREENBAUM, IMPL., ETC., DEFENDANT and appellant.

GENTLEMEN: Please take notice that the defendant, Herman Greenbaum, excepts to the findings of fact in the report of the referee herein, dated July 10th, 1871, as follows:

72 First. To the first finding of fact wherein the referee found that on the 10th day of August, 1868, Elias Oppenheimer was then insolvent, and with the intent to give the defendants a preference over others of his creditors, confessed a judgment in favor of the defendants for the sum of eleven hundred and fifteen dollars and fifteen cents in the district court of the first judicial district of the State of Nebraska, and to the whole of said finding, and to each and every part thereof.

Second. To the second finding of fact, and to each and every part thereof.

Third. To the third finding of fact, and to each and every part thereof, wherein he finds that the agents and the attorneys of the defendants who obtained for said defendants said confession of judgment, and who entered up and perfected said judgment, had at the time reasonable cause to believe that said Oppenheimer was insolvent at the time of such confession of judgment; that said judgment was confessed and a preference given thereby to the defendants over the other creditors of

Oppenheimer in fraud of the provisions of the act to establish a uniform system of bankruptcy, passed March 2d, 1867.

Fourth. To the fourth finding of fact, and to each and every part thereof, wherein the referee finds that the said attorneys and agents of the defendants issued an execution on said judgment to the sheriff of the proper county in the State of Nebraska, and collected and received on account thereof and on said execution out of the proceeds of the sale of the property of said Oppenheimer, the sum ot three hundred and seventy-nine dollars and fourteen cents.

Fifth. To the fifth finding of fact, and to each and every part thereo..

Sixth. To the sixth finding of fact, and to each and every part thereof.

73 Seventh. Defendant and appellant further excepts to the conclusion of law, wherein the referee finds that the plaintiff is entitled to recover of the defendants the sum of $379.14, with interest from 1st of October, 1869, besides costs of this action, and to each and every part of said conclusion of law, whereas referee should have found that plaintiff was entitled to nothing, and should have dismissed the complaint.

Supreme court, city and county of New York.

WILLIAM H. HOOVER AS ASSIGNEE IN BANKRUPTCY of Elias S. Oppenheimer, a bankrupt,
vs.
ABRAHAM WISE, HERMAN GREENBAUM, Moses Greenbaum, and Jacob Greenbaum.

This cause having been referred to Hon. Hooper C. Van Vorst to hear and determine the same, and his report having been filed, whereby he finds to be due from the defendants the sum of $426.23, now, on motion of Brown & Estes, esqs., plaintiff's attorneys, it is adjudged that the plaintiff do recover of the defendants the said sum, with $274.83, costs and disbursements, amounting in the whole to the sum of seven hundred and one dollars and six cents.

But the judgment can be enforced only against the joint prop-

74 erty of all the defendants herein, and the separate property of the said defendants Abraham Wise and Herman Greenbaum who were served with copies of the summons and complaint.

The supreme court of the State of New York.

WILLIAM H. HOOVER, ASSIGNEE, ETC., respondent,
vs.
HERMAN GREENBAUM, IMPL., ETC., APPELLANT.

Please take notice that the defendant, Herman Greenbaum, appeals to the general term of this court from the judgment entered herein on the 10th day of August, 1871, and from the whole of said judgment.

New York, August 14th, 1871.

KAUFMANN, FRANK & WILCOXSON,
Attorneys for Defendant Greenbaum.

To Messrs. BROWN & ESTES,
Attorneys for Respondent,
and
CHAS. E. LOEW,
Clerk Supreme Court.

At a general term of the supreme court, for the first judicial department, held in the court-house in this city of New York, on the 18th day of April, 1872.

Present: Hon. D. P. Ingraham, *P. J.*; Hon. Albert Cardozo, *J.*

75 WILLIAM H. HOOVER AS ASSIGNEE IN bankruptcy of Elias S. Oppenheimer, a bankrupt, plff. and respt.,
against
HERMAN GREENBAUM, IMPLEADED, ETC., DEFT. and appt.

The appeal from the judgment entered in this action on the 10th day of August, 1871, for seven hundred and one $\frac{6}{100}$ dollars, having been heard at the general term, it is now, on motion of Roger A. Pryor for appellant, after hearing Benjamin Estes for respondent, adjudged that the said judgment be reversed and a new trial ordered, costs to abide the event.

A copy.

CHAS. E. LOEW,
Clerk.

Supreme court.

WILLIAM H. HOOVER AS ASSIGNEE IN BANKruptcy of Elias S. Oppenheimer, a bankrupt, appellant,
vs.
HERMAN GREENBAUM, IMPLEADED, ETC., RESpondent.
} Notice of appeal.

Take notice, that the plaintiff in this action hereby appeals
76 from the order of the general term of this court, dated the 18th day of April, 1872, and entered on the 30th day of April aforesaid in the clerk's office of the city and county of New York, reversing the judgment herein on the report of the referee and granting a new trial, and from each and every part thereof, to the court of appeals, and hereby stipulate for judgment absolute against the appellant in case the said order is affirmed by the court of appeals.

Dated May 6th, 1872.

BROWN & ESTES,
Appellant's Attys.

To CHARLES E. LOEW,
Clerk of the City and County of New York,
And to MESSRS. KAUFMANN, FRANK & WILCOXSON,
Respondents' Attys.

A copy.

CHAS. E. LOEW,
Clerk.

Roger A. Pryor, esq., appears as, and is, the attorney for the respondents on this appeal.

State of New York, City and County of New York, ss:

I, Charles E. Loew, clerk of the supreme court in and for said county, do hereby certify that the foregoing consists of certified copies of the notice of appeal, the order appealed from, and the papers on which the court below acted in making said order.

In witness whereof I have hereunto set my hand and affixed my official seal this 27th day of May, A. D. 1872.

[CLERK'S SEAL.] CHAS. E. LOEW,
Clerk.

77 WILLIAM HOOVER, ASSIGNEE, ETC.,
vs.
HERMAN GREENBAUM, IMPLEADED, ETC. } Opinion.

The evidence in this case cannot be considered sufficient to charge upon the defendants knowledge of the insolvency of the debtor. There is no proof to show any knowledge on his part of the insolvency, beyond the non-payment of the claim against him and the collection of the judgment. If such facts are held sufficient to charge a creditor with the knowledge required by the bankrupt-act, it would be dangerous for any creditor to collect from his debtors the claims he had against them, by legal proceedings. The creditor should have the knowledge that the debtor was acting in view of insolvency, and with intent to give him a preference. In this case the creditor had no such knowledge, and the facts which it is claimed the attorney for the creditor obtained in the prosecution of the suit were not sufficient to charge on the defendant such knowledge. So far as appears in the case, the defendants had no knowledge that the action was brought by McLennan & Archibold, in Nebraska, and there was no communication by them to the defendants. If they erred in the course they adopted, the defendants are not chargable with their acts without notice.

The judgment should be reversed, and a new trial ordered, costs to abide event.

78 In the Supreme Court of the United States, William H. Hoover, assignee, etc., vs. Hermann Greenbaum et al.

Commission of appeals.

WILLIAM H. HOOVER, ASSIGNEE, ETC.,
vs.
HERMAN GREENBAUM, IMPLEADED, &C. } No. 75. May 7, 1874.

REYNOLDS, C.:

The appeal is by the plaintiff, from an order of the general term of the New York common pleas reversing a judgment entered upon the report of a referee and ordering a new trial. The order not stating the reversal to have proceeded upon any error of fact, we are to assume it was made for some supposed error of law.

The action was brought by the plaintiff, as the assignee in bankruptcy of one Oppenheimer, to recover from the defendants monies alleged to have been collected in violation of the 35th and 39th sections of
79 the bankrupt-act of the United States. Oppenheimer was a merchant in Nebraska, and was the debtor of the defendants, merchants in New York, to the amount of over $1,000, which in July, 1868, had been several months overdue, and thereupon they handed their

claim over to Ledyard, Archer and Co., a law and collection agency in the city of New York, with instructions to collect it, and they forwarded to one McClellan, an attorney in Nebraska City, for that purpose. He was one of the firm of McClellan & Archbold; and this firm sued Oppenheimer, in Nebraska, on the claim of the defendant, and on the 10th of August, 1868, *and* obtained judgment by confession. An execution on the judgment was, on the same day, placed in the hands of the
80 sheriff, and the money realized thereon sought to be recovered in this action. This money was remitted, after deducting costs, to Ledyard, Archer and Co., but no part of it ever reached the defendants, it having been otherwise disposed of by Ledyard, Archer and Co. Oppenheimer was at the time insolvent beyond all question, and this was known to the attorneys who obtained the judgment and collected the money. Within less than four months after the judgment was obtained, Oppenheimer was adjudged a bankrupt by the district court of the United States in Nebraska, and the plaintiff duly appointed his assignee.

In order to entitle the plaintiff to recover, it must, among other
81 things, be made to appear that at the time the confession of judgment was obtained against Oppenheimer the defendants had reasonable cause to believe that Oppenheimer was insolvent and confessed the judgment to give a preference in fraud of the bankrupt-act.

The defendants' account against Oppenheimer was overdue, and shortly after it matured the defendant Greenbaum, who had charge of closing up the affairs of his late firm, wrote to the debtor for payment, and he replied that, business having been very dull, he would thank them to wait on him, and he would send the money in a short time; but he failed to remit, and hence the claim was handed over to Ledyard, Archer and Co. for collection. Greenbaum swears that at this
82 time he had no knowledge of the financial condition of Oppenheimer, or that other suits had been commenced against him, or of other claims or judgments. This does not authorize a finding that he had reasonable cause to believe that Oppenheimer was insolvent within the meaning of the bankrupt act. Greenbaum did not know that the judgment had been taken by confession, or by whom the claim was being prosecuted in Nebraska, or that any money had been collected or remitted to Ledyard, Archer and Co. until after a demand was made upon him to pay it over to the plaintiff. It is therefore impossible that he can be charged, personally, with a reasonable cause of belief of any fraud committed in violation of any of the provisions of the
83 bankrupt act, and I think there must be some condition of the creditors' personal participation in the alleged illegal act before the extraordinary remedy given by the act of Congress can be enforced. The defendants had the undoubted right to pursue Oppenheimer to judgment, execution, and levy, and the fraud is supposed to consist in the confession, which no doubt did operate to secure a largely qualified preference, but of this the defendants in fact knew nothing. There was no relation of attorney and client or principal or agent between the Nebraska attorneys and the defendants, which by construction can charge them with the knowledge of the affairs of Oppehheimer they had, or of any action of theirs had, in fraud of the bankrupt law. (72
84 Pennsylvania, 124.) In any view, they were not commissioned or authorized to commit any fraud whatever which can be imputed to the defendants. No instructions were given them, and no communication had with them, or the defendants did not even know what lawyers had charge of the claim in Nebraska, and the agents employed by them in New York had no instructions to subject their clients to any of

the penalties of fraud, but only to do their best to collect the debt; and it does not appear to me that, if in their zeal any of the provisions of the bankrupt act has been violated, this knowledge be imputed to the defendant within the meaning of the act. (Kerr on Frauds, 261, and cases cited in note; Cobb vs. Beake, 6, 2 Q. R., 930; Scammon vs. Cole, 5 National Bank Register, 254; Wager vs. Hall, 16 Wallace,
85 United States, 545; Condit vs. Baldwin, 21 New York Reports, 219; Wilson vs. City Bank, 17 Wallace, United States, 473.)

If, in fact, the defendant had received the money in dispute with any reasonable suspicion of all the facts as now disclosed, it might perhaps have been said that the acts of the agent had all been ratified, including the supposed fraud; but it is unnecessary to consider that question.

Upon every material question of fact in the case touching the liability of the defendant the evidence was uncontradicted, and we may therefore consider whether it in law authorized the finding of the referee, and we are of the opinion that it did not.

The order appealed from must be affirmed, and judgment absolute ordered in favor of the defendant, with costs.

86 "Reynolds reads for affirmance. All concur. Order affirmed. Judgment absolute against plaintiff, with costs."

A copy, but not for publication.

H. E. SICKELS, *Reporter.*
Per O.

It is hereby agreed that the above opinion shall be filed as a part of the record in the case of Hoover, assignee, v. Greenbaum et al., in the Supreme Court.

JNO. H. B. LATROBE &
O. F. BUMP,
Attys. for Appellant.

W. W. BOYCE,
Counsel for Defendant.

(Indorsed:) Cour' of appeals. William H. Hoover, assignee, &c., vs. Herman Greenbaum, impleaded, &c. Opinion. Reynolds, C.

(Also indorsed:) Sup. Court U. S. 1875, Octo. term. No. 608. Wm. H. Hoover, assignee, &c., vs. Abraham Wise & al. Opinion. Filed 21 October, 1875.

(Also indorsed:) Supreme Court of the United States. William H. Hoover, as assignee in bankruptcy Elias S. Oppenheimer, a bankrupt, plaintiff in error, against Abraham Wise, Herman Greenbaum, Moses Greenbaum, and Jacob Greenbaum, defendants in error. Return on writ of error. Edgar F. Brown, atty. for plaintiff in error, 229 Broadway, New York City.

(Indorsement on cover:) No. 608. William H. Hoover, assignee of Elias S. Oppenheimer, a bankrupt, appellant, vs. Abraham Wise, Herman Greenbaum, Moses Greenbaum, & Jacob Greenbaum. New York Sup. Ct. Remittitur. Filed 25th September, 1875.

In the Supreme Court of the U. S.

No. 608.

WILLIAM H. HOOVER, ASSIGNEE,

vs.

ABRAHAM WISE, ET AL.

And now comes the plaintiff in error, and for assignment of errors says:

1st. That on the evidence contained in the record, the Court of Appeals of the State of New York erred in ordering judgment absolute against the plaintiff in error.

2d. That on the special findings of fact by the referee on pages 31 and 32 of the record, the Court of Appeals of the State of New York erred in ordering judgment absolute against the plaintiff in error.

3d. That on the evidence contained in the record, the Court of Appeals of the State of New York erred in holding that the defendants in error did not have reasonable cause to believe that Elias Oppenheimer was insolvent at the time of the confession of the judgment under which the money was obtained for the recovery of which this action was brought, and that said judgment and execution thereon were in fraud of the provisions of the bankrupt law.

4th. That on the special findings of fact by the referee contained on pages 31 and 32 of the record, the Court of Appeals of New York erred in holding that the defendants did not have reasonable cause to believe that Elias S. Oppenheimer was insolvent at the time of the confession of the judgment under which the money was obtained, for the recovery of which this action was brought, and that said judgment and execution thereon were in fraud of the provisions of the bankrupt law.

5th. That the Court of Appeals of the State of New York erred in holding, on the evidence in the record and the special findings of the referee on pages 31 and 32, that the defendants were not, under the provisions of the bankrupt law, bound by the knowledge of their agents.

6th. That the Court of Appeals of the State of New York erred in holding that the defendants were not liable, under the provisions of the bankrupt law, for money received by their agent as a preference, when they did not receive it themselves.

JOHN H. B. LATROBE,
ORLANDO F. BUMP,
Attorneys for Plaintiff in Error.

In the Supreme Court of the U. S.

No. 608.

WILLIAM H. HOOVER, ASSIGNEE,

vs.

ABRAHAM WISE, ET AL.

ARGUMENT FOR PLAINTIFF IN ERROR.

I. STATEMENT OF FACTS.

The defendants in error were partners, trading in the city of New York, under the name of Wise, Greenbaum & Co. On the 8th of October, 1867, they sold certain goods of the value of $1,048 to Elias S. Oppenheimer, on a credit of four months, a statement whereof is contained in the record on page 10, (Record, p. 22.) They afterwards demanded the money of Elias S. Oppenheimer; but he replied, "that business having been very dull, he would thank us to wait on him and he would send the money in a short time." (Record, p. 23.) William V. Archer, was a member of the firm of Ledyard, Archer & Co., who did a law and collection business in the city of New York. (Record, p. 21.) In July, 1868, he was in the

store of the defendants. They asked if he knew anything of Oppenheimer. He said he did not, but would ascertain. He made inquiries and informed the defendants that "if the claim was sent at once, he thought he could make it." (Record, p. 21.) The claim was then nearly six month past due. (Record, p. 23.) The account was then made out, verified by one of the defendants and put in his hands. (Record, p. 21.) The claim was given to Ledyard, Archer & Co., who were collection agents, for collection. (Record, pp. 21, 22.) They were instructed "to try their best to collect it," and informed the defendants that "they would send it out." (Record, p. 22.) On cross-examination the defendant says: "I placed the same in the hands of Ledyard, Archer & Co., so that they could sue and collect." (Record, p. 22.) It was accordingly forwarded to McLennan, a lawyer of Nebraska City. (Record, 21.) Herman Greenbaum, one of the defendants, testified that about a month afterwards Ledyard, Archer & Co. told him "they had sued and would obtain judgment," but he did not know that other suits had been brought against Oppenheimer at that time. (Record, p. 22.) William V. Archer testified as follows, to wit: "I told Greenbaum that I had received a letter from the correspondent at Nebraska City; that judgment had been obtained against Oppenheimer in favor of Wise, Greenbaum & Co., and I hoped to make the money or a greater part of it; that if the claim had been received sooner, there might have been no doubt of it." "I told him there were other judgments against him at this time." (Record, p. 21.) This conversation took place in August, 1868, about three weeks after the claim was first sent out.

William McLennan, to whom the claim was sent, was a partner of Edward Archibold, who practised law in Nebraska City, in the State of Nebraska, under the name of McLennan & Archibold. (Record p. 17.) The affidavit to the claim was made in New York, on the 27th day of July, 1868, and suit was instituted thereon in Nebraska, on the 1st day of August, 1868.

(Record, pp. 10, 11.) Edward Archibold testified that "it must have come in a letter with directions to sue; for in the then state of the mails it was pretty speedy to get to this city between the 27th day of July and the 1st day of August." (Record, p. 18.) The summons issued in that suit was returnable on the 10th day of August, 1868, and warned the defendant that unless he answered by the 31st day of August, 1868, the petition would be taken to be true and judgment entered against him. (Record, p. 12.) On the 10th day of August, 1868, Elias S. Oppenheimer appeared and confessed judgment. (Record, p. 12.) *This was twenty-one days before the judgment could have been entered regularly.* Edward Archibold testifies as follows: "A great many suits were pending against Oppenheimer in the management of other counsel, and one other suit in our own management. We were afraid, therefore, that if the suit went on to maturity without judgment, everything would be swept away by the other claims, leaving nothing for Wise, Greenbaum & Co., so we applied to Elias S. Oppenheimer to confess judgment. He did so without much apparent reluctance and without difficulty, and accordingly judgment was entered on his confession." (Record, p. 19, 2nd cross int.) He also says: "Elias S. Oppenheimer was overwhelmed with debts, and when we got the claim was about to be overwhelmed with judgments, and it was nothing but a race of diligence between creditors." (Record, p. 19, last cross int.)

On the 10th day of August, 1868, an execution was issued on the judgment. (Record, p. 13.) This and nine other executions came into the hands of the sheriff on the *same day and hour.* (Record, p. 14.) A levy was made on the property of Elias S. Oppenheimer on the 10th day of August, 1868, and the property sold on the 24th, 25th, 26th and 27th days of August, 1868. (Record, p. 14.) The proceeds were divided between the ten executions, as set forth on pages 14 and 15 of the record. The proportion allotted to Wise, Greenbaum & Co. was $415.42. Of this amount $36.28 was retained as costs, and $379.14 was

paid to William McLennan. (Record, p. 15.) The sheriff returned that he could find no other property of the defendant in the county. (Record, p. 15.) Edward Archibold testified, "it is my impression Elias S. Oppenheimer became totally insolvent and remains insolvent yet." (Record, p. 18, last int.) After paying all costs of collection, attorneys, fees, etc., McLennan & Archibold remitted $235 to Ledyard, Archer & Co., for the use of Wise, Greenbaum & Co. (Record, p. 20, 6th int.) In answer to the last interrogatory in chief, Edward Archibold testified that his firm only retained thirty-four or thirty-five dollars. (Record, p. 18.) The money was received by Ledyard, Archer & Co. and never paid over to Wise, Greenbaum & Co. (Record, p. 21.) There were other creditors who received nothing at all. (Record, pp. 23–30.)

Within four months after the confession of the judgment in favor of Wise, Greenbaum & Co., Elias S. Oppenheimer was adjudged bankrupt, and the plaintiff in error was appointed his assignee, and an assignment in due form was made to him. (Record, pp. 30, 31.) The plaintiff in error then demanded the money from the defendants. (Record, p. 22.) Payment being refused, suit was brought on the 1st of October, 1869, in the Supreme Court of the City of New York. (Record, p. 7.) The defendants answered and the cause was referred to a referee. (Record, p. 9.) The referee made a special finding of facts. (Record, pp. 31, 32.) And as a conclusion of law reported that the plaintiff was entitled to recover $379.14, with interest from October 1st, 1869, and costs. (Record, p. 32.) The defendants excepted to the referee's report. (Record, p. 34.) But the Supreme Court at special term, entered judgment on the report in favor of the plaintiff. (Record, p. 35.) The defendants then appealed to the General Term of the Supreme Court (Record, p. 35) where the judgment was reversed. (Record, p. 36.) The plaintiff then appealed to the Court of Appeals (Record, p. 36) where the order of the General Term was affirmed, and judgment

absolute ordered against the plaintiff. (Record, p. 6.) This was accordingly entered. (Record, pp. 3–5.) The plaintiff thereupon sued out a writ of error from the Supreme Court of the United States, to have this judgment reversed. The opinions of the General Term and of the Court of Appeals are found on pp. 37–39 of the record.

II. PRACTICE IN STATE COURT.

1. It is settled law in New York that the State Courts have jurisdiction over actions brought by an assignee, to recover money received as a preference.

Cook vs. Waters, 9 B. R. 155, S. C. 55, N. Y. 150.
Gilbert vs. Priest, 8 B. R. 159, S. C. 63, Barb. 369.
Gilbert vs. Crawford, 46 How., Pr., 222.

2. The decision in other States support the same doctrine.

Jordan vs. Downey, 40 Md. 401.
Lewis vs. Sloan, 68 N. C. 557.
Kemmerer vs. Tool, 12 B. R. 334.
Dambmann vs. White, 48 Cal., 439.

3. This case was sent to a referee, and the referee made a special finding of facts, and stated his conclusion of law. The order of the General Term did not state that the judgement was reversed upon any error of fact. In such a case the Court of Appeals cannot examine the opinion delivered by the General Term, but assumes that the judgment was reversed upon errors of law only.

Phelps vs. Vischer, 30, N. Y. 69,
Sheldon vs. Sheldon, 51 N. Y., 354.
Vermilyea vs. Palmer, 52, N. Y., 471.

4. The Court of Appeals concedes that the law is applicable to the present case, in the opinion contained in the record.

5. If the referee omitted to find any fact, the Court of Appeals will presume that he found such fact, although it is not contained in his report. If there is any evidence whatever to sustain the finding, it will be presumed that the referee found all the facts necessary to sustain the judgment entered on his report.

Brainard vs. Dunning, 30 N. Y., 211.
Ashley vs. Marshall, 29 N. Y., 494.
Smith vs. Coe, 29 N. Y., 666.
Viele vs. Troy and Boston R. R. Co., 20 N. Y., 184.

6. In the last case cited, there were no finding of facts whatever.

III. JURISDICTION OF THE SUPREME COURT.

1. If a party claims a right, title or privilege, under a statute of the United States and the decision of the State Court is against his claim, he may sue out a writ of error.

Revised Statues of the United States, Section 709.
Pollard vs. Kibbe, 14 Pet., 353
Mobile vs. Eslava, 16 Pet., 234.
State vs. Bachelder, 1 Wall., 109.
Rector vs. Ashley, 6 Wall., 142.

2. It is not material whether the invalidity of the title was decreed in the State court on a question of fact or of law.

Lytle vs. State, 22 How., 193.

3 If the State court decides that the title is bad, and therefore not protected by the statute, the Supreme Court may decide that the title is good, and therefore protected by the statute. Every error in respect to a title specially set up and claimed under a statute, is re-examinable.

Martin vs. Hunter, 1 Wheat, 304.
Smith vs. State, 6 Cranch, 286.
Chouteau vs. Eckhart, 2 How., 344.

IV. ARGUMENT ON THE MERITS.

1. The first question is, whether this case is affected by the amendatory act of June 22, 1874, 18 Stat., 178. There are two arguments to show that it does not. First—The Revised Statutes, title I., ch. 2, § 13, expressly provides, that, "The repeal of any statute shall not have the effect to release or extingush any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." Second—Sections 39 and 35 of the bankrupt law have always been construed together as being *in pari materia*. In re Richter's Estate, 4 B. R. 221, S. C., 1 Dillon, 186; in re Tonkin & Trewartha, 4 B. R. 52. Section 12 of the act of June 22, 1874, expressly provides that it shall apply to cases commenced since the 1st day of December, 1873. *Expressio unius, exclusio allerius.* It has accordingly been held that the amendment did not affect transactions that occurred, or cases that were instituted prior to December 1st, 1873.

Hamlin v. Pettibone, 10 B. R., 172.
Brooke v. McCracken, 10 B. R., 461.
Bradbury v. Galloway, 12 B. R., 299.
In re Milton Montgomery, 12 B. R., 321.

2. The mere fact that the preference was obtained by means of judgment, does not prevent a recovery.

Clarion Bank v. Jones, 21 Wall, 325.

3. The judgment in this case was a judgment by confession, and therefore is not protected.

Traders' National Bank v. Campbell, 14 Wall, 87.
Clarion Bank v. Jones, 21 Wall, 325.

4. The insolvency of the debtor, the commencement of proceedings in bankruptcy within four months, and the intent to prefer are so clearly established by the evidence that no discussion is needed upon these points.

5. The defence appears to rest on three grounds: 1st. That the creditors themselves did not have reasonable cause to believe the debtor insolvent. 2d. That the creditors cannot be charged with the knowledge of their attorney. 3d. That the creditors cannot be held liable, because they did not personally receive the money. These propositions will be considered in their order.

6. The account was past due. The creditors were informed that if it was sent out at once it might be made. It was sent with instructions to sue and collect. A transfer by means of a judgment is out of the ordinary course of business, and is by the act, therefore, *prima facie* evidence of fraud. This alone constitutes reasonable cause. In re Kingsbury, 3 B. R., 318. It has accordingly been held that where the creditor has been compelled to sue he has the required reasonable cause.

Haskell vs. Ingalls, 5 B. R., 205.
In re Walton et al., Deady, 442.
Hood vs. Karper, 5 B. R., 358.
Zahm vs. Fry, 9 B. R., 546.
Buchanan vs. Smith, 8 Blatch., 153, S. C., 16 Wall, 277.
Mayer vs. Herman, 10 Blatch., 256.
Pierce vs. Evans, 61 Penn., 415.

7. The attorneys who obtained the confession of judgment, knew that the debtor was hopelessly insolvent. They took all the debtor's property. The execution came into the hands of the sheriff at the same time with nine others, and the proceeds were divided *pro rata* among all ten, thus showing that there was a combination between the ten execution creditors. The

principal is chargeable with all the knowledge which his agent had at the time of the transaction.

In re E. Meyer, 2 B. R., 422.
Ungewitter vs. Von Sachs, 4 Ben., 167.
Graham vs. Stark, 3 Ben., 520.
Vogle vs. Lathrop, 4 B. R., 439.
Markson vs. Hobson, 2 Dillon, 327.
Mayer vs. Hermann, 10 Blatch., 256.
The Distilled Spirits, 11 Wall., 356.
U. S. vs. Wyngall, 5 Hill, 16.
Mech. Bank vs. N. Y. & N. H. R. R. Co., 3 Kern., 632.
Story on Agency, §452-454.
1 Parsons on Cont., 5th Ed., 44, 57, 74, *et seq.*

Constructive knowledge of all the facts must be imputed to the principal whether there is fraud relating to the transaction or not.

Kerr on Fraud and Mistake, 200, *et seq.*
Bank vs. Davis, 2 Hill, 452, 461.
Sanford vs. Handy, 23 Wend., 268.
Mali vs. Lord, 39 N. Y., 368.
Griswold vs. Haven, 25 N. Y., 595.

8. The above point will be made clearer by examining the actual authority of the attorneys who took the judgment. The business of Ledyard, Archer & Co. was to take claims for collection in different parts of the country and, if necessary, have them sued. (Record, p. 23.) Mr. Archer informed Mr. Greenbaum that if the claim was sent on at once it could be made. The account was made out and verified, and put in the hands of Ledyard, Archer & Co. (Record, p. 21.) The directions were to try their best to collect it, and the reply was that it would be sent out. (Record, p. 22.) It was placed in their hands so that

they could sue and collect. (Record, p. 22.) The creditors were afterwards informed that suit had been brought and judgment obtained. (Record, pp. 21, 22.) The money realized on the judgment was remitted to Ledyard, Archer & Co. These facts show ample authority to employ McLennan & Archibold, and to bring suit and a ratification of the act by the principals, for the letter of McLennan was communicated to the principals. (Record, p. 21.) McLennan & Archibold had authority to collect and sue. They could receive money without suit, even though the debtor was insolvent. As attorneys they had full control over the suit, and authority to accept a confession of judgment. This is done by attorneys every day. In fact they would have been liable to their principals if they had not taken the judgment and received the money. Carlisle Soule 44, Vt. 265. Insolvency does not suspend collections, nor divest an attorney of his usual powers. Such a doctrine would lead to disastrous consequences, for very few insolvencies become bankruptcies. The fallacy of the doctrine lies in the assumption, that the act of the attorneys was unlawful at the time when it was done. A liability was imposed upon the principals by the debtor's subsequent bankruptcy, bnt with that act they had nothing to do. Their act was lawful at the time, and they could not foresee that subsequent event. The illegality consists not in taking a preference, but in retaing the money after the debtor's bankruptcy.

When an agent is authorized to employ a sub-agent, the principle of *respondent superior* applies.

Story on Agency, § 454.

Storrs vs. City of Utica, 17 N. Y., 104.

An agent who has the power to appoint a sub-agent, may ratify his acts and thereby make them binding on the principal.

1 Parsons on Cont., 5th Ed. 53.

Newton vs. Bronson, 3 Kern., 587.

An agent binds his principal by such subordinate acts as are necessary to, or usually and properly done in connection with the principal act to carry the same into effect.

1 Parsons on Cont. 5th Ed., 57.

The referee accordingly styles Mr. Lennan and Archibold, attorneys of the defendants, (Record p. 31). To find that the agent of a party did a thing, is equivalent to finding that the agent was authorized to do that thing.

9. That the act of the attorneys was lawful when it was done, has already been considered. The defendant cannot object to their liability on that ground. But in fact the money came to Ledyard, Archer & Co., whose authority is unquestioned. The only remaining question therefore, is whether it is necessary that the money shall actually come into the hands of the principals.

Receipt of money by an agent is in contemplation of law a receipt by the principals.

Colvin vs. Holbrook, 2 N. Y., 126.
Broom's Legal Maxims, 552 *et seq.*
2 Parsons on Con., 5th Ed., 614.

It has also been held that the principal was liable for the full value of the property, without any deduction for the expenses or fees retained by the attorney.

Street vs. Dawson, 4 B. R., 207.
Sedgwick vs. Millward, 5 B. R., 347.
Christman vs. Haynes, 8 B. R., 528
Clarion Bank vs. Jones, 21 Wall., 325.
Traders' National Bank vs. Campbell, 2 Biss., 423 S. C. 14 Wall 87.

In Street vs. Dawson the Court say that in a legal sense, the fees retained by an attorney, must be deemed to have come into the hands of the principal.

There is in reality but one point for decision in this case, and that is, whether the consequences of an agent's defalcation shall fall on his principal or on the assignee—on the party who selects him, or on a stranger who had no option in the matter. The statute seems to be conclusive on the point. It has only provided for a recovery from the creditor. It is the creditor who receives the preference, and who is made liable under the statute. As against the debtor the creditors are estopped by the record of the judgment to deny that they received the money. They are equally estopped as against the assignee.

JOHN H. B. LATROBE,
ORLANDO F. BUMP,
Attorneys for Plaintiff in Error.

In the Supreme Court of the U. S.

No. 608.

WILLIAM H. HOOVER, ASSIGNEE,

vs.

ABRAHAM WISE, ET AL.

REPLY FOR PLAINTIFF IN ERROR.

1. The order of the General Term did not state that the judgment was reversed for any error of fact. In such a case it must be assumed that the reversal was for errors of law.

Wait's Annotated N. Y. Code, § 272, p. 486, and cases cited on page 5 of argument for plaintiff in error.

2. The order of reversal granted a new trial, but neither party had further testimony to produce. In such a case an appeal would not ordinarily lie. The statutes of New York, however, provide for an appeal from the General Term upon filing a stipulation for an absolute judgment in case the order of the General Term is affirmed. The provision is as follows, to wit:

"The Court of Appeals shall have exclusive jurisdiction to review upon appeal every actual determination hereafter made at a general term by the Supreme Court, or by the Superior Court of the city of New York, or the Court of Common Pleas for the city and county of New York, or the Superior Court of the city of Buffalo, in the following cases and no other."

2. "In an order affecting a substantial right, made in such "action, when such order in effect determines the action and "prevents a judgment from which an appeal might be taken, or "discontinues the action, and when such order grants or refuses "a new trial, or when such order strikes out an answer, or any "pleading in an action; *but no appeal to the Court of Appeals "from an order granting a new trial on a case made or bill of excep- "tions, shall be effectual for any purpose, unless the notice of appeal "consent on the part of the appellant, that, if the order be affirmed, "judgment absolute shall be rendered against the appellant.*"

Wait's Annotated N. Y. Code, § 11, p. 27.

It will be seen that under these provisions the appeal from the General Term to the Court of Appeals presented questions of law arising from the evidence and the findings of the referee. In no other way could the case have been carried to the highest court of the State. The writ of error in this case is brought to reverse, not the judgment of the General Term, but the judgment of the Court of Appeals. If there was error in that judgment, the plaintiff in error is entitled to a reversal, for no judgment ought, under the laws of the United States, to be entered on the stipulation.

JNO. H. B. LATROBE,
ORLANDO F. BUMP,
Attorneys for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1875.

WILLIAM H. HOOVER, Assignee,
vs.
ABRAHAM WISE *et al.*
No. 608.

Submitted under 20th Rule on Printed Arguments.

ARGUMENT FOR DEFENDANTS IN ERROR.

1. We submit that the court here should not take jurisdiction, for the following reasons:

The supreme question upon which the liability of defendants depends is whether they had knowledge that the debtor, Oppenheimer, in giving the confession of judgment, was acting in view of insolvency, and with intent to give them a preference.

The question is an issue of fact, and error does not lie on an issue of fact.

That this question is an issue of fact, see—

Sarlup *v.* McDonald, 7 Scott N. R., 280.

Burton *v.* Griffiths, 11 Meeson & Welsby, Exchequer R., p. 816.

Writ of error removes nothing for re-examination but the law.

Wiscart *v.* Dauchy, 3 Dall., 321.

"Where the court is required to weigh conflicting testimony or to balance admitted facts, and to deduce from these the propositions of fact, on which alone a legal conclusion can rest, it is not such a statement as the court will act on."

Burr *v.* Des Moines Nav. Co., 1 Wall., 99.

All the issues in this cause, by consent, were referred to H. C. Van Vorst. (Transcript, p. 9.)

The referee, Van Vorst, reported certain facts, and his conclusion of law upon them, in favor of plaintiff below. (Transcript, p. 31.)

Judgment was entered in the Supreme Court for the city and county of New York on the report of the referee in favor of plaintiff below.

Appeal was taken from this judgment to the general term of same court. (Transcript, p. 35.)

At the general term the judgment appealed from was reversed and a new trial ordered. (Transcript, p. 36.)

The court, at the general term, in the opinion filed by it reversing the judgment in favor of plaintiff below and ordering a new trial, says, *inter alia:*

"The *evidence* in this case cannot be considered *sufficient* to charge upon the defendant's knowledge of the insolvency of the debtor. There is no *proof* to show any knowledge on his part of the insolvency beyond the nonpayment of the claim against him and the collection of the judgment." Thus treating the questions involved in the appeal as questions of fact. (Transcript, p. 37.)

From this judgment ordering a new trial plaintiff below appealed to the court of appeals. (Transcript, p. 36.)

And it is to be noted that the plaintiff below, in taking the appeal last mentioned, expressly stipulated "for judgment absolute against appellant, in case the said order (the subject of the appeal) is affirmed." (Transcript, p. 36.)

In the appeal court the order appealed from was affirmed, and judgment rendered against plaintiff below with costs. (Transcript, p. 39.)

It is true the appeal court undertake to determine the

case upon an assumed state of facts, but the facts they assume are not in harmony with the facts found by the referee. For instance, the referee, in his finding of facts, No. 3, finds that the attorneys who took the confession from the debtor were the agents and attorneys of the defendants below, (Transcript, p. 31,) whereas the appeal court says: "There was no relation of attorney and client, or principal and agent, between the Nebraska attorneys and the defendants." (Transcript, p. 38.) This is one of the disputed facts in the case, which this court will be called upon to decide.

The vice of the plaintiff's case is, as we conceive, that there is no statement of ultimate facts in the case, so as to make the questions raised pure questions of law. The appeal court, rejecting the finding of facts by the referee, arrives at its conclusions as to the facts from the evidence in the case. This court cannot do this, and so this court cannot take jurisdiction of the case.

2. If the court should think we are in error on this question, then we submit the judgment of the appeal court was right for the following reason:

a. McLellan and Archer, the Nebraska attorneys, were not defendants' agents.

The facts are: That Ledyard, Archer & Co. were a law and collection agency in the city of New York; that respondent delivered the claim to them for collection; that they forwarded the claim to McLellan, a lawyer in Nebraska City; that McLellan was employed by Ledyard, Archer & Co; that the money collected was remitted to Ledyard, Archer & Co.; that respondent never employed McLellan & Archbold, nor communicated with them, nor knew they had charge of the claim, nor knew or heard of the confession of judgment, nor knew anything of Oppenheimer's financial condition; that until the demand by appellant's attorney, respondent knew not of the collection of the claim and never received any proceeds of the claim.

It results as a conclusion of law from the facts that

the Nebraska attorneys were *not* respondents' agents. (The Montgomery Co. Bank *v.* The Albany City Bank 7 N. Y., 459; Commercial Bank of Penn. *v.* Union Bank of N. Y., 11 N. Y., 211; Blake *v.* Ferris, 5 N. Y., 49; Kelly *v.* Mayor, 11 N. Y., 432; Pack *v.* Mayor, 8 N. Y., 222; Durst *v.* Barton, 47 N. Y., 170; Linton *v.* Smith. 8 Gray, 147; Story on Agency, sec. 454*a*, *et seq.*; Sproul *v.* Hemmingway, 14 Pick., 1; DeForest *v.* Wright, 2 Mich., 368; German Bank *v.* Edwards, 53 N. Y., 544; Eaton *v.* European & Northern R. R. Co., 59 Maine, 520; S. C., 8 Am. R., 430; Cuff *v.* Newark & N. Y. R. R. Co., 35 N. J., 17; S. C., 10 Am. R. 206; Ib., on appeal, 35 N. J., 575; Kimbal *v.* Cushman, 103 Mass., 194; S. C., 4 Am. R., 531; Water Co. *v.* Ware, 16 Wall., 576; Robbins *v.* Chicago, 4 Wall., 679; Cobb *v.* Becks, 6 Q. B., 930; Robbins *v.* Fennell, 11 Q. B., 248, 256; Yates *v.* Frecklston, 2 Doug., 623; Helps *v.* Clayton, 17 C. B., (N. S.,) 553; Mackersey *v.* Ramsays, 9 Clarke & Fin., 818, 850; Linton *v.* Smith, 8 Gray, 147; Reedie *v.* The London, &c., 4 Exch., 244; Milligan *v.* Wedge, 12 Ad. & E., 737; Rasson *v.* Cubitt, 9 M. & W., 710; Overton *v.* Freeman, 11 C. B., 867; Laugher *v.* Pointer, 5 B. & C., 547; Quarman *v.* Burnett, 6 M. & W., 499.)

In Cobb *v.* Becke, Lord Denham said: "The rule undoubtedly is that there is no privity between the agent in town and the client in the country. The former cannot maintain an action against the latter for his fees, nor the latter against the former for negligence."

b. Assuming that the relation of principal and agent subsisted between respondent and the Nebraska attorneys, they are still not responsible for their *unauthorized* and *unratified participation* in the *unlawful act of preference.* "The commission of a fraud being beyond the scope of the authority of a solicitor, the fraud of the solicitor cannot of course be imputed to the client." (Kerr on Frauds, 261; and cases in note 4.) It cannot be presumed that he intended to commission them to expose him to the penalties

denounced by secs. 23 and 39, Bankrupt Act. (Owings *v.* Hall, 9 Peters, (U. S.,) 607; Verona, &c., *v.* Murtaugh, 4 Lans., 17; Clarke *v.* Metropolitan Bank, 3 Duer, 241; Bank of Commonwealth *v.* Mayor, 43 N. Y., 189; Ward *v.* Van Duzen, 2 Hall, 187; Bell *v.* Day, 32 N. Y., 165; Condit *v.* Baldwin, 21 N. Y., 219; Mali *v.* Lord, 39 N. Y., 381; Fraser *v.* Freeman, 43 N. Y., 568; Vanderbilt *v.* Richmond, &c., 2 N. Y., 479; Wright *v.* Wilcox, 19 Wend., 343; Foster *v.* Essex Bank, 17 Mass., 479; Wilson *v.* Rankin, 34 L. J., Pt. II, 67; 35 L. J., Pt. II, 87; Lyons *v.* Martin, 8 A. & E., 512; Ellis *v.* The Sheffield, &c., 2 E. & B., 767; Earle *v.* Rawscroft, 8 East., 133; Peachy *v.* Rowland, 13 C. B. 182; 76 E. C. L. Rep., 181; Story's Agency, (8th ed.,) sec. 179, p. 244.)

The statute (Bankrupt Law, sec. 35) makes it a condition of recovery in this action that the *creditor* shall have reasonable cause to believe that the act of preference was done in fraud of the provisions of the Bankrupt Act. The liability to restitution is a penalty imposed upon the creditor's *personal participation* in the illegal act, and here no such participation is pretended. (Scammon *v.* Cole, 5 Nat. Bank Register, 259; Wager *v.* Hall, 16 Wall., 595; Condit *v.* Baldwin, 21 N. Y., 219; Clarke *v.* Metropolitan Bank, 3 Duer, 249.

Respondent had a right to sue his debtor to judgment, execution, and levy. *It is the confession of judgment* only that invalidates the proceedings and creates the liability, and to this respondents were not parties or privies. (Wilson *v.* City Bank, 17 Wall. U. S., 473.)

It must be kept in mind that the defendants never received the money collected on the confession of judgment. If they had received the money, their position would be greatly changed. It will be found, on reference to the cases decided under the bankrupt act, imputing notice to the creditors, where preferences were unduly obtained by the attorney of the creditor, without the actual knowl-

edge at the time of the creditor, that the creditor afterwards received the money.

Where the creditor receives the money, the court very properly considers this a ratification, and holds the creditor responsible for the illegal action of his attorneys. Profiting by the fraud, he is presumed to adopt it. The decisions in that class of cases have no application to defendants' case.

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